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No. 92-44

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV,

Petitioner,

—v.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, ODC COMMUNICATIONS CORPORATION, and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EUGENE R. SCHEIMAN
Counsel of Record
HOWARD GRAFF
NEAL S. BARLIA
FRANCIS S. CHLAPOWSKI
ADAM R. ALLAN
BAER MARKS & UPHAM
805 Third Avenue
New York, New York 10022
(212) 702-5700

Attorneys for Petitioner
Cable Holdings of Georgia, Inc.

Dated: July 2, 1992

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals—which conflicts with decisions of other panels of that Court of Appeals and other federal courts—erred in holding that § 621(a)(2) of the Cable Communications Policy Act of 1984 does not provide a franchised cable operator with the right to construct its system following private utility easements or other private, compatible easements?

2. Whether § 621(a)(2) of the Cable Communications Policy Act allows cable operators to co-use easements dedicated for compatible uses without effectuating a taking of property under the Fifth Amendment to the United States Constitution?

3. Whether, if § 621(a)(2) of the Cable Communications Policy Act of 1984 does effectuate a taking, it also provides the property owner just compensation for the taking?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29 NOTIFICATIONS

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed here.

Petitioner Cable Holdings of Georgia, Inc., d/b/a Smyrna Cable TV has no parent companies or subsidiaries.

Since the constitutionality of the Cable Communications Policy Act of 1984 is at issue in this proceeding, 28 U.S.C. § 2403(a) may apply and, pursuant to Rule 29.4(b) of the Rules of the Supreme Court of the United States, a copy of this petition is being served on the Solicitor General. To the best of counsel's knowledge, the Court of Appeals did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cable Holdings of Georgia, Inc. ("Cable Holdings") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The April 9, 1992 order of the court of appeals denying rehearing and a suggestion of rehearing *en banc* (73a) is unreported. The February 12, 1992 opinion of the court of appeals reversing the district court and remanding to the district court for entry of judgment in favor of respondents (1a-18a) is reported at 953 F.2d 600 (11th Cir. 1992). The district court's October 10, 1986 order granting in part and denying

in part both petitioner's and respondents' cross-motions for summary judgment (34a-41a) is reported at 678 F. Supp. 871 (N.D. Ga. 1988). The remaining orders of the district court, attached in the Appendices hereto, are unreported.

JURISDICTION

The final judgment of the court of appeals was entered on February 12, 1992. (1a). The order of the court of appeals denying rehearing and rehearing *en banc* was entered on April 9, 1992. (73a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "[N]or shall private property be taken for public use, without just compensation." The entire text of the Fifth Amendment is set forth in Appendix P attached hereto. (75a).

2. Section 621(a)(2) of the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 541(a)(2), provides, in pertinent part: "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses . . . ." The entire text of § 621 of the Cable Act is set forth in Appendix Q attached hereto. (76a-78a).

STATEMENT OF THE CASE

Petitioner Cable Holdings operates a cable television system[1] in Cobb County, Georgia pursuant to a nonexclusive

1 A cable television system provides service to customers through coaxial cable which carries the signal with the material which the cable oper-

franchise issued by the County. Cable Holdings served its customers at the Lakes and Woodsong Apartments from 1980 until the fall of 1985, when its service was curtailed by respondents. This action was instituted to regain access to those important customers.[2]

On April 29, 1985, McNeil entered into two substantially identical contracts with respondent ODC Communications Corporation ("ODC"), a private cable television operator, which purport to provide ODC with the exclusive right to construct, maintain and operate its private cable system at the Lakes and Woodsong Apartments. Those contracts contain provisions which the district court found establish easements in favor of ODC. (62a). In addition, easements exist at the apartments in favor of the telephone and electric utilities. (60a). McNeil has refused Cable Holdings access to the Lakes and Woodsong Apartments through co-use of these easements.

Cable Holdings instituted this action to enforce its right under the Cable Act to construct, maintain and operate its cable television system at the Lakes and Woodsong apartments. Federal jurisdiction was based on, *inter alia*, the federal question presented by Cable Holdings' Cable Act claims, pursuant to 28 U.S.C. § 1331. By an order dated October 10, 1986 (34a), the district court determined that Cable Holdings had a right under the Cable Act to construct and operate its system through any compatible easements that exist at those apartments. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F. Supp. 871, 873 (N.D. Ga. 1986) [hereinafter *Cable Holdings I*]. In so doing, the district court rejected the respondents' argument that § 621(a)(2) is limited to publicly dedicated easements and that the Cable Act was

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ator wishes to transmit from the cable system's head end to the customer. The cable is generally constructed along utility poles or through underground conduit. *See Leathers v. Medlock*, 111 S. Ct. 1438, 1441 n.1. (1991).

2 At the time that this action was commenced, respondents McNeil Real Estate Fund VI, Ltd., Woodsong Associates, Ltd. and the Robert A. McNeil Corporation (collectively "McNeil") owned and/or operated the apartments.

unconstitutional unless so limited to publicly dedicated easements. *Id.*[3]

Thereafter, by order dated September 28, 1989, the district court found that the contracts between McNeil and ODC, which purport to grant ODC the exclusive right to provide private cable television service to the apartments, created easements which Cable Holdings may follow. (62a).[4] The court also found that Cable Holdings could follow "along easements that are actually occupied with the [telephone and electrical] equipment." (62a).

The court initially delayed entering final judgment until the issue of just compensation was resolved under the Takings Clause of the Fifth Amendment to the United States Constitution. By order dated November 27, 1990, however, the district court, principally relying on the Eleventh Circuit's decision in *Centel Cable Television Co. of Florida v. Thos. J. White Dev. Corp.*, 902 F.2d 905 (11th Cir. 1990), determined that respondents were not entitled to just compensation for Cable Holdings' use of ODC's easements. (70a). Final judgment was entered in favor of Cable Holdings on November 29, 1990. (71a).

By an opinion dated February 12, 1992 (1a), the United States Court of Appeals for the Eleventh Circuit reversed the district court, interpreting § 621(a)(2) to provide a franchised cable company with the right to co-use only those easements which have been dedicated for general utility use; "dedicated" meaning relinquished by the owner of the property for use by the general public. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992) [hereinafter *Cable Holdings II*]. In so inter-

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3 The district court found, however, that Cable Holdings' system, under the evidence then before it, was not constructed through compatible easements. *Id.* at 874. Thereafter, on September 28, 1988, the district court dismissed by consent all remaining claims and counterclaims in the action with the exception of the Cable Act claims. (51a).

4 Cable Holdings is the publicly franchised operator. Thus, contrary to the respondents' argument below, the exclusivity provision in ODC's contracts does not bar Cable Holdings' service at the Lakes and Woodsong Apartments.

preting the Cable Act, the court of appeals purports to avoid determining whether § 621(a)(2) effectuates a constitutional taking and, if so, whether the statute provides for just compensation. *Id.* at 604. By an order dated April 9, 1992, the court of appeals denied Cable Holdings' petition for rehearing and suggestion of rehearing *en banc*. (73a).

REASONS FOR GRANTING PETITION

On at least 8 prior occasions, this Court has addressed regulatory and constitutional questions raised by federal, state and local regulation of the cable television medium.[5] Those issues affect the nearly 56 million subscribers serviced by 11,314 cable systems serving some 30,579 communities. *See* Broadcasting & Cable Marketplace 1992 at xxiii (R.R. Bowker 1992).[6] This Court has not, however, addressed the statutory and constitutional questions affecting these subscribers and cable operators which are raised by § 621(a)(2), although at least 17 courts have issued decisions interpreting that section of the Cable Act.[7] This Court should grant cert-

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5 *E.g.*, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991); *City of New York v. Federal Communications Comm'n*, 486 U.S. 57 (1988); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Federal Communications Comm'n v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

6 Approximately 147 million people (or 60.3% of all television households) have access to cable television. *See* Broadcasting & Cable Marketplace 1992 at xxiii. Industry revenues in 1991 were approximately $18 billion, with the average subscriber paying $18 for basic cable service. *See id.* In 1991, "pay cable" services, those provided in addition to basic services at extra cost, were provided by approximately 9,000 systems reaching 51 million subscribers in 50 states. *Id.*

7 *See, e.g.*, *Centel Cable Television Co. of Florida v. Thos. J. White Dev. Corp.*, 902 F.2d 905 (11th Cir. 1990); *Cable Investments, Inc. v. Wool-*

rari to resolve the conflict in these decisions and the statutory and overarching constitutional issues raised by *Cable Holdings II* and the statute itself.

The court of appeals' interpretation of § 621(a)(2), which limits a cable operator's co-use privilege solely to publicly dedicated easements, conflicts with prior decisions of the Eleventh Circuit and numerous other lower courts, is contrary to the plain language and important public policies fostered by the statute, and has the practical effect of eviscerating this section entirely.

The district court's determination that the Cable Act does *not* apply solely to publicly dedicated easements is consistent with the majority of federal courts that have addressed the issue in the Eleventh Circuit and elsewhere. However, driven by the potential constitutional issue involved, other courts, including the panel in *Cable Holdings II*, have provided an assortment of confusing and conflicting decisions that must be settled by this Court.

Further, the court of appeals' determination that its narrow interpretation of the Cable Act was necessary to avoid a perceived takings issue is fundamentally flawed. First, inter-

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ley, 867 F.2d 151 (3d Cir. 1989); *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir. 1988); *Heritage Cablevision of California, Inc. v. J.F. Shea Co.*, No. C-90-20073-WAI (N.D. Cal. May 21, 1992); *Booth American Co. v. Total TV of Victorsville*, No. CV-91-2286-RSWL (C.D. Cal. Jan. 31, 1992); *Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners*, 737 F. Supp. 903 (E.D. Va. 1990); *UACC-Midwest, Inc. v. Edward Rose & Sons*, No. 1:90-CV-383 (W.D. Mich. May 22, 1990); *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422 (D. Md. 1989); *Cable Associates, Inc. v. Town & County Management Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989); *United Cable Television of Michigan v. Eyde*, No. L89-30103 CA (W.D. Mich. Nov. 20, 1989); *Centel Cable Television Co. of Florida v. Burg & DiVosta Corp.*, 712 F. Supp. 176 (S.D. Fla. 1988); *TCI of North Dakota, Inc. v. Linke*, Civil No. A4-88-250 (D.N.D. Dec. 2, 1988); *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F. Supp. 1315 (D. Del. 1986); *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F. Supp. 1244 (D. Mass. 1985); *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425 (Mich. Ct. App. 1990); *Centel Cable Television Co. of Ohio v. Cook*, Nos. 14-88-8, 14-88-10 (Ohio Ct. App. Sept. 27, 1989); *Kohler v. Warner Amex Cable Communications, Inc.*, No. 2-86-18 (Ohio Ct. App. Oct. 9, 1987).

preting a statute essentially out of existence (legislating by judicial fiat) is not a proper application of the rule that constitutional questions should be avoided. Second, as the Eleventh Circuit and other federal and state courts have already determined, and consistent with this Court's determinations, once a property owner grants an easement for compatible use, public or otherwise, Congress may make that easement accessible to a cable operator without constituting a compensable taking of property. Federal courts addressing this constitutional issue, however, have not been consistent and this Court should resolve the takings question before the issue becomes further confused in the lower courts.

Finally, even if the cable operator's co-use of a compatible easement would constitute a taking, § 621 provides for just compensation. Again, however, the courts addressing this issue have not been consistent; some have found the statute does provide for just compensation and others have found that it does not.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER PANELS OF THE SAME COURT OF APPEALS AND OTHER FEDERAL COURTS AND HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF INTERPRETATION OF THE FEDERAL CABLE COMMUNICATIONS POLICY ACT OF 1984 WHICH SHOULD BE SETTLED BY THIS COURT

The Cable Act was the first comprehensive effort by Congress to provide a uniform scheme to properly regulate the cable television industry and to ensure its growth and development in order to best serve the viewing public.[8] The resulting legislation governs many significant aspects of the cable

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8 As early as 1970, the Federal Communications Commission ("FCC") recognized that " 'actions have been taken in the cable field without any overall plan as to the Federal-local relationship.' " *Cable Television Report and Order*, 36 F.C.C.2d 143, 204 (1972) (quoting *Notice of Proposed Rule Making in Docket 18892*, 22 F.C.C.2d 50 (1970)). Thus, the FCC noted that "[t]his has resulted in a patchwork of disparate approaches affecting the development of cable television." *Id.* Additionally, the FCC stated that "[c]able television is an emerging technology that promises a communica-

industry, ranging from franchising and renewal to equal employment practices and subscriber privacy.[9]

The purposes of the Cable Act[10] reflect the Congressional concern to ensure a stable marketplace for cable operators and ensure that the public will receive the widest variety of programming choices, including news, information, entertainment and sports.[11] One of the obstacles to the growth of cable communications that Congress sought to remedy was the attempt by developers and property owners to physically exclude franchised cable operators from servicing so-called

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tions revolution. Inevitably, our regulatory pattern must evolve as cable evolves—and no one can say what the precise dimensions will be." *Id.* at 210.

9 The Cable Act "is a long and complicated statute." Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543, 545 (1985). Pursuant to requirements of the Cable Act, subscribers receive benefits by obtaining their cable service from a franchised cable operator. These benefits include: the availability of public, educational or government use channels and cable channels designated for commercial use, §§ 611, 612; the regulation of services, facilities and equipment, § 624; protection of subscriber privacy, § 631; protection of the consumer, § 632; the prohibition against discrimination in the provision of service and in employment by the cable operator, §§ 621(a)(3), 634; and the prohibition against the transmission of obscene material over the cable system, § 639. *See generally* 47 U.S.C. §§ 521-59.

10 Those purposes are to establish a national policy concerning cable communications; to establish procedures to encourage the growth and development of cable systems; to establish guidelines for the exercise of federal, state and local authority with respect to the regulation of cable systems; to assure that cable systems provide the widest diversity of information sources and services to the public; to establish renewal procedures to protect a cable operator from unfair denial of renewal of its franchises; to promote competition in cable communications and to minimize local regulations imposing an undue economic burden on cable operators. 47 U.S.C. § 521.

11 The regulatory framework prior to the enactment of the Cable Act "[was a] patchwork of federal, state, and local regulations and court decisions. . . . The result has been an unstable regulatory environment that has been bad for the cable industry, bad for the local and state franchising authorities, and bad for the consumers." 130 Cong. Rec. S14283 (daily ed. October 11, 1984) (Statement of Sen. Goldwater). "Existing cable regulation has frustrated the development of cable television, depriving the viewing public of full diversity of information and services cable has potential to provide." 130 Cong. Rec. H10435 (daily ed. Oct 1, 1984) (statement of Rep. Wirth).

"private developments" or "subdivisions."[12] Instead, the developers sought to serve this captive audience with a private system owned by the developer or some entity with which the developer had contracted.

To remedy this problem, Congress drafted § 621(a)(2) of the Cable Act, which provides a cable franchisee a right of access to private property "through easements . . . which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2). Thus, Congress legislated that franchised cable television operators may co-use any compatible easements on private property. At the heart of the *Cable Holdings II* decision is the court's interpretation of the term "dedicated" and the phrase "dedicated for compatible uses" which eviscerates the statutory scheme and makes it virtually impossible for a cable operator to co-use compatible easements.

The district court interpreted "dedicated" to mean "to set aside," stating that "[t]he language of [Section 621(a)(2)] contains no requirement that the easement be dedicated for public use . . . ." *Cable Holdings I*, 678 F. Supp. at 873. The district court simply required, pursuant to the statute, that such easements be set aside for compatible uses. *Id.*

The court in *Cable Holdings II* concluded that the district court's interpretation of § 621(a)(2) raised serious constitutional questions in that co-use of private, compatible easements would appropriate the owner's right to exclude and thus effectuate a compensable taking under the United States Constitution. *Cable Holdings II*, 953 F.2d at 604-5. In order

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12 According to industry reports, in 1986 approximately 25-30 million Americans nationwide lived in the country's 100,000 or so planned residential developments. *See Housing; Getting Away From It All*, The Economist, April 5, 1986 at 32; Associated Press, *Condo Pioneers Having to Face Some Delayed Problems*, May 4, 1985, *available in* LEXIS, Nexis Library, AP File (reporting that more than 50% of new housing in the nation is now being built within a community association structure). In the past decade, the number of developments has grown from 45,000 to 150,000 and is projected to reach 250,000 by the year 2000. *See* Community Association Institute 1992 Information Sheet (the Community Association Institute is a national, nonprofit educational and information organization created in 1973 to serve the nation's condominium, co-operative and homeowner associations and is located at 1630 Duke Street, Alexandria, Virginia 22314, (703) 548-8600).

to avoid the constitutional issue, the court summarily stated that "Congress's use of the word dedicated at least suggests a reference to the legal meaning of dedication." *Id.* at 606. Thus, according to the court in *Cable Holdings II*, "an easement is legally 'dedicated' only when the private property owner entirely relinquishes his rights of exclusion regarding the easement so that the general public may use the property." *Id.* at 606. The court concluded that this interpretation was supported by the legislative history and the policies behind the Cable Act. *Id.* at 606-08.

It is respectfully submitted that the court of appeals is wrong. *See* Richard Harmon, *Co-use of Compatible Private Easements By Cable Television Franchisees under the 1984 Cable Act: Federal Refinement of an Established Right*, 22 Golden Gate U. L. Rev. 1, 15-17 (1992) (criticizing the court of appeals decision in *Cable Holdings II*); *see also Heritage Cablevision of California, Inc. v. J.F. Shea Co., Inc.*, No. C-90-20073-WAI (N.D. Cal. May 21, 1992) (criticizing the court of appeals decision in *Cable Holdings II*).[13] Given the important statutory and constitutional issues raised by the court of appeals and the conflict among the Eleventh Circuit and many lower courts, this Court should review the decision in *Cable Holdings II*.

A. *Cable Holdings II* Is Inconsistent With Prior Panels of the Eleventh Circuit

In *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir. 1988), a prior panel of the same court rejected the argument that § 621(a)(2) applied only to publicly dedicated easements. In *Admiral's Cove*, the court stated that "the determination by [the property owner] that Congress authorized Centel's use of public easements, but not easements dedicated for use by utilities [is] contrary to the legislative history of the Cable Act."

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13 Indeed, cable franchisees may be subject to the threat of state-levied *sanctions* if they do not provide cable services to such multi-unit dwellings, despite a building owner's protestations or "exclusive" contract with a private cable operator. *See, e.g.*, Crain Communications, Inc., *Connecticut, Cable In Dispute*, July 2, 1990, available in LEXIS, Nexis Library, Current File.

Id. at 1363. Thus, "any private agreements which would prevent a cable franchise from using utility easements is unlawful," *id.* at 1362, and access should be provided to utility easements that were "voluntarily *grant[ed]*," not publicly dedicated, or "however obtained." *Id.* at 1363 n.7 (emphasis added).

The Eleventh Circuit followed *Admiral's Cove* in *Centel Cable Television Co. of Florida v. Thos. J. White Dev. Corp.*, 902 F.2d 905 (11th Cir. 1990). In *White*, the defendants excluded a cable operator from using private roads within a private development that were necessary to maintain its cable system, which was constructed along utility easements. In order to justify this exclusion the defendants argued that the Cable Act authorized use of public easements, but not utility easements, and that the Cable Act would be unconstitutional if applied to non-public easements. The district court, relying on *Admiral's Cove* and *Cable Holdings II*, rejected these contentions stating that "the legislature did not place any special significance on the meaning of the term 'dedicate' over and above its common meaning 'to set aside'." *Centel Cable Television Co. of Florida v. Thos. J. White Dev. Corp.*, 88-14148-CIV, slip op. at 16-17 (S.D. Fla. Feb. 28, 1989). (93a). The district court was affirmed by the Eleventh Circuit. *White*, 902 F.2d at 911.

The court of appeals' radical departure from the holdings of *Admiral's Cove* and *White* was rationalized by limiting those cases to their facts; that is, the compatible easements in those cases were legally dedicated to general utility use via plat recordation. *Cable Holdings II*, 953 F.2d at 609 n.9. Such a limitation, however, is inconsistent with the express holdings of those cases, which provide that § 621(a)(2) applies to compatible utility easements "however obtained," especially such easements that were "*voluntarily grant[ed]*." *Admiral's Cove*, 835 F.2d at 1363 n.7 (emphasis added); *see White*, 902 F.2d at 909.[14]

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14 Moreover, the factual limitation imposed by the court of appeals, based on a unique aspect of Florida state law, is illogical. In *Admiral's Cove* and *White* the easements were *not* publicly dedicated in the legal sense

The court of appeals below also found that the deletion of § 633 (entitled "Consumer Access to Cable Service") from the draft bill that became the Cable Act somehow restricts § 621(a)(2) to easements dedicated to "public use" instead of also encompassing private easements. *Cable Holdings II*, 953 F.2d at 606-07. Relying on the Third Circuit decision in *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989), the court found that the broad access right of § 633 cannot be read into § 621(a)(2) because both existed in the draft bill. *Cable Holdings II*, 953 F.2d at 607. As set forth below, the *Woolley* analysis is inconsistent with the Eleventh Circuit's prior decision in *Admiral's Cove*, thus evidencing a split in the circuits and the difficulty courts have had in addressing § 621(a)(2) co-use issues.

Section 633 was a consumer access/tenants' rights provision, *not* an easement co-use provision like § 621(a)(2). *See* Harmon, 22 Golden Gate U. L. Rev. at 4 (1992).[15] Access

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required by the court of appeals below. Rather, the decision below indicates that under Florida law a developer must set aside a corridor for general utility use via plat recordation. *Cable Holdings II*, 953 F.2d at 608. Although the state law of dedication differs throughout the nation, generally a "dedication" requires an unequivocal *offer by the owner* to devote his property to a public use, and *acceptance of that offer* by the public. *See, e.g.*, 23 Am. Jur. 2d *Dedication* § 1 (1983). Satisfaction of these elements is not evident from either *Admiral's Cove* or *White*. *Cf. id.* § 43 (mere filing of a plat is not enough to establish legal dedication). Clearly, there is no basis in § 621(a)(2) to conclude that a cable operator's co-use privilege should depend upon a quirk of state law; that is, whether a general utility easement is created via plat recordation. The court of appeals' interpretation of § 621(a)(2) thus legislates all substance out of this section of the Cable Act and offends the very purpose of the act—to create a national policy for cable communications. 47 U.S.C. § 521(1).

The effect, of the court of appeals' interpretation of Florida's plat recordation statute is not unlike the law in Georgia which provides for compulsory access to private property for utilities. *See* Ga. Code Ann. § 46-5-1 (1989). If access is consensual, Georgia recognizes a utility easement. *See* Ga. Code Ann. § 44-9-4 (1989). Thus, there is no substantive difference—in each instance state law recognizes utility easements. Indeed, in the case at bar, the district court based its decision, in part, on such utility easements.

15 Proposed section 633 would have provided:

> The owner of any multi-unit residential or commercial building . . . may not prevent or interfere with the construction or installation of

under § 633 would have been triggered solely by a tenant's request, not by a cable franchisee's exercise of a co-use privilege to a pre-existing easement. *Id.* Moreover, § 633 applied without regard to the existence of compatible easements. In contrast, § 621—which provides a narrow right of access solely to cable system operators on compatible easements—was not deleted. This crucial distinction between the deleted consumer access provision and § 621 was recognized in *Admiral's Cove*:

> We note that an early House version of the Cable Act contained a Section 633 which with some exceptions forced any landlord to allow the rewiring of his building for cable when a tenant requested cable television. This unratified section may have provided the tenant with a cause of action if the landlord did not permit access to cable television. We find no evidence, however, that by failing to ratify Section 633, Congress intended to prohibit a private right of action under § 621(a)(2) to cable operators.

Admiral's Cove, 835 F.2d at 1362 n.6 (citation omitted).

B. *Cable Holdings II* Is Inconsistent With Other Court Decisions

A majority of courts addressing this issue have also rejected limiting § 621(a)(2) to public easements. In addition to *Admiral's Cove* and *White*, the courts in *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F. Supp. 1244 (D. Mass. 1985), *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F. Supp. 1315 (D. Del. 1986), *United Cable Television of Mid-Michigan v. Eyde*, No. L-89-30103 CA (W.D. Mich. Nov. 20, 1989) (slip op.) (108a), *quoted in*

> facilities necessary for a cable system . . . if cable service . . . has been requested by a lessee or owner . . . of a unit in such building or park.

Woolley, 867 F.2d at 156 (quoting H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 13 (79a)).

Harmon, 22 Golden Gate U.L. Rev. at 12. n.44, *Booth American Co. v. Total TV of Victorsville*, No. CV 41-2286-RSWL (C.D. Cal. Jan. 31, 1992), and *Heritage Cablevision of California, Inc. v. J.F. Shea Co.*, No. C-90-20073-WAI (N.D. Cal. May 21, 1992), recognized that the co-use privilege extended to ordinary, private utility easements. In *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422 (D. Md. 1989), the Maryland District Court granted a cable system access to easements granted to utilities; there was no suggestion in the case of any "public" dedication. In *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425 (Mich. Ct. App. 1990) the court stated that: "The majority of courts that have construed the statute have rejected arguments that 47 U.S.C. § 541(a)(2) grants only a right to construct cable television lines through publicly dedicated easements." *Id.* at 428.

A number of lower courts have expressed a contrary view, which is consistent with *Cable Holdings II*. One case, in addition to the decision below, *Cable Associates, Inc. v. Town & County Management Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989), concluded that "dedicated" in § 621(a)(2) meant dedicated for public uses, since there is a general rule favoring technical meanings over the ordinary definition of common words. *Id.* at 584 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)).[16] Other courts have followed this

16 *Corning Glass Works v. Brennan* does not support a general proposition favoring technical definitions over common usage. Indeed, the general rule is the opposite. *See St. Lukes Hosp. Ass'n v. United States*, 212 F. Supp. 387, 391-92 (N.D. Ohio 1962) ("when a word which has both a technical and a common and ordinary meaning appears in a statute, the later meaning will prevail over the former in the absence of any indication that the word was used in its technical sense"), *rev'd on other grounds*, 333 F.2d 157 (6th Cir. 1964), *cert. denied*, 379 U.S. 963 (1965). In *Corning*, the term in question was adopted by Congress, at the suggestion of experts within a particular field, to refine a statutory definition. *See Corning*, 417 U.S. at 198-202; *see also Cooper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 600 n.7 (D.C. Cir. 1981). Absent such congressional intent that "dedicated" should have its obscure legal connotation, the normal definition should apply. *See Corning*, 417 U.S. at 201-02; *Cooper Valley*, 653 F.2d at 600; *Amarrillo Production Credit Ass'n v. Farm Credit Administration*, 887 F.2d 507, 511 (5th Cir. 1989). Likewise, the word "dedicated" does not fall under

minority view. *See Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners*, 737 F. Supp. 903, 911 n.14 (E.D. Va. 1990); *Centel Cable Television Co. of Ohio v. Cook*, Nos. 14-88-8, 14-88-10 (Ohio Ct. App. Sept. 27, 1989); *Kohler v. Warner Amex Cable Communications, Inc.*, No. 2-86-18 (Ohio Ct. App. Oct. 9, 1987). In light of the many cases, cited above, finding that "dedicated" should have its common, not technical, meaning, this important issue of statutory interpretation should be settled by this Court.

C. *Cable Holdings II* is Inconsistent With The Plain Language of the Cable Act

The court of appeals decision below violates settled rules of statutory construction. As found by the district court: "The language of [§ 621(a)(2)] contains no requirement that the easement be dedicated for public use." *Cable Holdings I*, 678 F. Supp. at 873; *see* Daniel Brenner et al., *Cable Television and Other Nonbroadcast Video: Law and Policy* § 3.03[2][d], at 3-37 (1992) (the judicial interpretations of § 621(a)(2) that grant cable operators the right to enter private multiple dwellings through compatible easements are "more consistent with the unqualified statutory language" of § 621(a)(2)). The court of appeals found, nevertheless, *without citing any authority*, that the term "dedicated" in the statute, standing alone, means that the easement must be dedicated to the public. *Cable Holdings II*, 953 F.2d at 606. This conclusory statement contravenes the "fundamental canon of statutory con-

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the rubric of the rule that " 'the law uses familiar legal expressions in their familiar legal sense.' " *Bradley v. United States*, 410 U.S. 605, 609 (1973) (citation omitted). The term "dedicate," an "exceptional" and "unusual" creature of real property law, is hardly a familiar legal term with a familiar legal definition. 23 Am. Jur. 2d *Dedication* § 1 (2d ed. 1983).

In addition, as discussed below, the legislative history of § 621(a)(2), the policies behind § 621(a)(2) and the FCC interpretation thereof further demonstrate that the word dedicate is to have its common meaning, not its technical, legal meaning. *See Amarillo Production*, 887 F.2d at 511; *In re Garner*, 18 B.R. 369, 371 (S.D.N.Y. 1982) (rejection of a technical meaning is especially appropriate when such a definition is not supported by the purposes of the statute).

struction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporaneous, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Railroad Yardmasters v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983).

In common usage, the verb "dedicate," which is used in the past tense by Congress in § 621(a)(2), means to "set apart for a definite use." *See* Webster's New Collegiate Dictionary 293 (1981); *see also* The American Heritage Dictionary 373 (2d ed. 1982) (defining "dedicate" as "to set apart for a special use"). Under the common meaning of the verb "dedicate," an "easement dedicated for compatible uses" includes any easement which has been set aside, established, or set apart for utility or other compatible use. The court of appeals interpretation was inconsistent with this common meaning.

This plain reading of the statute is also supported by the reference in § 621(a)(2) to "public rights-of-way." 47 U.S.C. § 541(a)(2). "In construing statutes, qualifying phrases are generally applied to the immediately preceding phrase and not to phrases more remote." *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1350 (9th Cir. 1982). Applying this statutory principle to § 621(a)(2), the word "public" *only* describes rights-of-way; the phrase beginning with the word "easements" is too remote. Had Congress intended to restrict § 621(a)(2) to "public" easements or easements "dedicated to the public" or "publicly dedicated easements," it would have used that language; the use of the adjective "public" in connection with "rights-of-way" evidences Congress's clear intent not to limit easements to those that are "public."

D. *Cable Holdings II* Is Inconsistent With The Legislative History Of The Cable Act

A determination that the Cable Act encompasses ordinary easements and not just easements dedicated for public use is also consistent with the legislative history of the Cable Act.

In the legislative history defining § 621(a)(2), Congress explained that:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been *dedicated* to compatible uses. This would include, for example, an easement or right-of-way *dedicated* for electric, gas or other utility transmission . . . . Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been *granted* to other utilities are in violation of this section and not enforceable.

H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 59 (1984), *reprinted in* U.S. Code Cong. & Admin. News 4655, 4696 (1984) ("House Report") (emphasis added). No mention of a "publicly dedicated easement" is made or can be inferred. Indeed, the House Report's use of the verb "granted" interchangeably with "dedicated" demonstrates that no special or technical significance is attached to the word "dedicated." Moreover, the House Report states plainly that § 621(a)(2) encompasses utility easements. Any limitation placed upon a cable operator's right to follow easements granted to a utility—whether publicly recorded on a plat or not—is unlawful.

The decision below also ignores the Congressional prohibition in the legislative history against private arrangements restricting access. It is impossible to envision a *private* arrangement which could restrict a third party's use of *publicly* dedicated property. There would simply be no need for the inclusion of that statement in the legislative history if the entry easements that could be followed were those that had been publicly dedicated. As stated by the district court in *United Cable*, No. L89-30103 CA, slip op. at 5-6 (112a):

> [N]either the statute nor the legislative history supports . . . [restricting Section 621(a)(2) to public easements]. First, the language of Section 621(a)(2) contains no requirement that the easement be dedicated for public

> use. Second, the legislative history contains no statements which would support the argument of the defendants on this issue. Actually, the legislative history supports the conclusion that Congress intended private easements to be within the scope of Section 621(a)(2) by stating that "[a]ny private arrangements which seek to restrict a cable system's use of such easements . . . which have been granted to other utilities are in violation of this section and unenforceable." Legislative History at 59, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4696. If Congress intended to permit access to only publicly dedicated easements, there would have been no need to include such a statement in the legislative history. Thus, the face of the statute does not create a distinction between public and private easements and the legislative history indicates that this lack of a distinction was intentional. Therefore, the Court rejects the defendants' argument that private easements are outside the scope of Section 621(a)(2) of the Cable Act.

See also Harmon, 22 Golden Gate U. L. Rev. at 12 n. 44 (quoting *United Cable*).

E. *Cable Holdings II* is Inconsistent with the Public Policy Underlying the Cable Act

The court of appeals' restrictive reading of the statute is also irreconcilable with the Cable Act's stated policies. One of the principal goals of the Cable Act is to establish "a national policy concerning cable communications." 47 U.S.C. § 521(1).[17] The Cable Act also "encourage[s] the growth and development of cable systems" and assures the "widest possible diversity of information sources and services to the public." 47 U.S.C. §§ 521(3), (5). Incorporation into

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17 The Eleventh Circuit previously explained that "[a]n important object of the Cable Act was to alleviate the patchwork of federal, state and local laws and regulations that hampered the growth of cable television." *Admiral's Cove*, 835 F.2d at 1363; *see also supra* notes 8-11 and accompanying text.

the Cable Act of the various common-law and statutory doctrines of public dedication of the 50 states would wreak havoc with achievement of these goals.

The doctrine of dedication for public use is an "exceptional and unusual method of passing title to interests in land." 23 Am. Jur. 2d *Dedication* § 1 (2d ed. 1983). The highly technical rules governing this area of the law vary from state to state, and much of the doctrine is now controlled by statutes peculiar to each jurisdiction. *See id.* §§ 1-3. Indeed, many states simply do not permit a public dedication to utilities, because although they serve a quasi-public function, most such companies are private, profit-making entities. *See id.* § 5, at 8; *see also Boyle v. Burk*, 749 S.W.2d 264, 266 (Tex. Ct. App. 1988) ("Although utilities that are granted easements are public utilities, they are privately owned companies and their easement rights are private." (citation omitted)). Moreover, although dedication generally requires dedication to some public use, some states also recognize the concept of private easement dedication. *See Briarcliffe Acres v. Briarcliffe Realty Co.*, 262 S.C. 599, 206 S.E.2d 886, 895 (1974) (a dedication to private use is in reality nothing more than an easement); *see also County of Sacramento v. Pacific Gas and Electric Co.*, 193 Cal. App. 3d 300, 313-14, 238 Cal. Rptr. 305, 314-15 (1987) ("[easements dedicated to public utilities] by their express terms, define the class of persons who have an interest or right in the use of the easement, and these easements do not extend rights to the public in general").

Further, the practical effect of the court of appeals' decision is to define the right to co-use compatible easements out of the Cable Act. After a lengthy discussion of the labyrinth of Georgia property law on "dedication," respondents' argued below that there is simply no such thing as a legally dedicated easement referencing private property internal to or on building structures. If there is simply no such thing as a dedicated easement internal to a building, every condominium or multi-family dwelling would be excluded from the co-use provision. This is repugnant to the legislative history of the Cable Act.

It is patently inconsistent with achieving national uniformity to condition application of the co-use provision on the vagaries of state statutes and common-law rules governing an "unusual and exceptional" method of creating an interest in land. Such a condition is also inconsistent with assuring widespread growth and diversity of cable television. Indeed, the court of appeals' interpretation holds that growth hostage to a bizarre array of arcane state rules, which respondents have admitted would never allow a cable operator to access a multi-family dwelling. These state law dedication arguments must be rejected.

F. *Cable Holdings II* Is Inconsistent With The Federal Communications Commission Interpretation of the Cable Act

The FCC has adopted an interpretation of § 621(a)(2) which is consistent with the legislative history and inconsistent with the statutory interpretation in *Cable Holdings II*. In considering proposed rules to implement the Cable Act, the FCC adopted the House Report's construction of the co-use provision:

> *General Franchise Requirements.* Section 621 of the Cable Act sets forth general franchising requirements. This section specifically grants a franchising authority the ability to grant one or more franchises within its jurisdiction. Section 621 also authorizes construction of a cable system over public rights-of way and through easements *designated* for compatible uses such as those used for utilities. Thus, *a property owner that has already granted or is obligated to grant an easement for utilities cannot deny cable access.* In constructing the system, the franchisee must ensure the safety and appearance of the property accessed through the easement and must bear the costs of the installation, operation or removal of equipment.

Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications

Policy Act of 1984, 49 Fed. Reg. 48769 (1984) (emphasis added). In response to public comment concerning the use of the term "designate," the FCC reiterated that "designate" was synonymous with "dedicate."[18]

Based on the foregoing, the court of appeals clearly violated settled rules of statutory construction, legislative intent and FCC interpretation in order to eviscerate § 621(a)(2). Moreover, the decision below and *Woolley* directly collide with the prior holdings of the Eleventh Circuit in *Admiral's Cove* and *White*, as well as numerous other courts that have addressed these issues. This disagreement among the circuits and other federal courts must be settled by this Court.

II. THE DECISION BELOW INTERPRETS ALL MEANING OUT OF SECTION 621(a)(2) OF THE CABLE ACT AND IN SO DOING MISAPPLIED THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The court of appeals premised its unsupportable construction of the Cable Act on the "canon of statutory construction" that a court should interpret a statute so as to avoid any constitutional issues raised and avoid an unconstitutional construction of the statute. *See Cable Holdings II*, 953 F.2d at 604. This deeply rooted doctrine, however, does not permit

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18 That report states:

> Our use of the phrase "designated for compatible uses" in the Notice *was not intended to be any more or less encompassing than the phrase "dedicated for compatible uses" used in the* Cable Act. With respect to the access issue, the House Report states that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights of way which have been granted to other utilities are in violation of this section and not enforceable." *Based on the legislative history and the clear language of the statute*, we find that a cable system does have the right to access through an easement as long as the other conditions are met.

Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18647 (1985) (emphasis added); *see also White*, 88-14148-CIV, slip op. at 17 (finding that the FCC has "declined to take a restrictive view of Section 541(a)(2)"). (94a).

a court to press statutory construction "to the point of disingenuous evasion" simply to avoid a constitutional question. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). " 'Although this Court will often strain to construe legislation to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially re-writing it." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)). Rather than hiding from the takings question, the court of appeals should have resolved it. It is now up to this Court to do so.

The court of appeals intimated that access to compatible, private easements would constitute a *per se* taking of private property, by usurping the property owner's right to exclude, thus requiring the payment of just compensation under the Takings Clause of the Fifth Amendment. *See Cable Holdings II*, 953 F.2d at 605 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)); *see generally* U.S. Const. amend. V. As the Eleventh Circuit and other courts have previously held, *Loretto* is not applicable. *Loretto* is inapplicable because § 621(a)(2) does not (i) authorize a physical occupation of the owner's property or (ii) constitute a total deprivation of all economically beneficial uses of the property. *See Lucas v. South Carolina Coastal Council*, No. 91-453, 1992 WL 142517 (June 29, 1992).

Loretto concerned a state regulation that allowed construction of a cable system in a building without the owner's consent; essentially, a new right of formal access was "created" for cable use which was not limited to co-use of existing easements. The Court, in its "very narrow" holding, found this forced permanent physical occupation to be a taking. *See Loretto*, 458 U.S. at 426, 441.[19]

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19 On remand, the New York Court of Appeals found that the statute required compensation for a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 149-52, 459 N.Y.S.2d 743, 747-48, 446 N.E.2d 428 (1983). The New York State Cable Commission established a rate of $1 per building as just compensation.

The Cable Act envisions no such forced physical invasion. A franchised cable operator's construction of a cable system is dependent on co-use of easements "which have been" set aside or established for compatible uses. 47 U.S.C. § 541(a)(2). Courts have held that *Loretto* does not apply where a cable system is constructed and installed by a franchised cable operator in accordance with § 621(a)(2); *i.e.*, within *existing* utility or other compatible use easements which have already been voluntarily set aside by the property owner.[20]

The Eleventh Circuit in both *Admiral's Cove* and *White* determined that Congressional authorization of the cable operators' use of utility easements did not violate the Takings Clause.[21] In *Admiral's Cove*, the court stated:

> Since most developers voluntarily grant easements for use by utilities, however, Congress may force the developer to allow a cable franchise to use the easement without offending the taking clause of the Constitution. *See FCC v. Florida Power Corp.*, ____ U.S. ____, 107 S.Ct. 1107, 94 L. Ed. 2d 282 (1987). Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a use.

Admiral's Cove, 835 F.2d at 1363 n.7.

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20 In *Lucas v. South Carolina Coastal Council*, No. 91-453, 1992 WL 142517 (June 29, 1992) this Court went even further than § 621 when it made clear that even a permanent physical occupation of land would not be a compensable taking if the restriction inhered in the title to the property. Thus, the Court "assuredly would permit the government to assert a permanent easement, that was a pre-existing limitation upon the landowner's title." *Id.* at *10. McNeil's title to the Lakes and Woodsong Apartment was subject to the pre-existing utility easements granted to the electric and telephone companies.

21 *But cf. Woolley*, 867 F.2d at 159-60 (finding that Cable Act does not permit co-use of private easements into interiors of multi-unit dwellings and that such a finding avoids the constitutional issue raised by *Loretto*); *Media General*, 737 F. Supp. at 909 (co-use of compatible private easements would constitute a taking under *Loretto*).

The Eleventh Circuit reexamined and reaffirmed *Admiral's Cove* in the *White* decision, stating "White's Taking Clause argument must be rejected under *Admiral's Cove*." *White*, 902 F.2d at 910; *see also United Cable*, No. L89-30103 CA, slip op. at 6-7. (112a-114a). Moreover, in his concurrence in *White*, Judge Henley recognized that *Loretto* would not apply to this case because the contracts creating the purported exclusive right and the easements which Cable Holdings may follow were entered into nearly four months after the effective date of the Cable Act. According to Judge Henley, under these circumstances:

> the Act could be construed not as requiring the developer's acquiescence in the installation of cable equipment, as was the case in *Loretto*, but rather as merely placing a *condition on the developer's future development of the property*.

White, 902 F.2d at 912 (emphasis added). Thus, § 621(a)(2) does not constitute a physical taking, but is instead a land use regulation which also does not constitute a taking because it does not deprive the property owner of all economically beneficial uses of the property.

This analysis is consistent with the Court's recent pronouncement in *Lucas*. Therein, this Court acknowledged that how the property owner's reasonable expectations have been shaped by property law will affect the balance when determining whether a use restriction deprives the owner of enough of the beneficial use of the property to constitute a taking. *Lucas*, No. 91-453, 1992 WL 142517 at *13 n.7; *see also id.* at *18 (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment."). Respondents have not argued, and the court of appeals did not find, that McNeil's reasonable investment expectation when it purchased the property was to share in the bounty from a private cable television system; nor could they have had settled investment expectations when they entered into the contracts with ODC *after* passage of the Cable Act.

The nonapplicability of *Loretto* is also supported by the standard common law principles of easement law providing for apportionment (or co-use) of easements. *See, e.g., Witteman v. Jack Barry Cable TV*, 192 Cal. App. 3d 1619, 228 Cal. Rptr. 584 (1986); *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 212 Cal. Rptr. 31 (1985); *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825 (Mo. Ct. App. 1985); *Hoffman v. Capitol Cablevision Systems, Inc.*, 82 Misc. 2d 986, 372 N.Y.S.2d 482 (N.Y. Sup. Ct. 1975), *aff'd*, 52 A.D.2d 313, 383 N.Y.S.2d 674 (3d Dep't 1976); *Jolliff v. Harden Cable Television Co.*, 26 Ohio St. 2d 103, 269 N.E.2d 588 (1971); *see also Harmon*, 22 Golden Gate U. L. Rev. at 7-11. Those cases stand for the proposition that once an easement is voluntarily granted to one entity, another entity that desires to make a similar use which will not unduly burden the easement or interfere with either the underlying property owner's use of his land or the easement holder's use of the easement, may use that easement without effecting a taking of the property. Indeed, the *Salvaty* court expressly rejected the claim that the co-use of compatible easements by a cable company constituted a taking under *Loretto*:

> Unlike the case at bench, there was no easement of any kind involved in *Loretto*. Here, we have an easement and the cable equipment was within the scope of that easement.

Salvaty, 115 Cal. App. 3d at 805, 212 Cal. Rptr. at 36. The Congressional authorization found in § 621(a)(2) is consistent with this principle.

The court in *Cable Holdings II* also misplaced reliance on *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245 (1987). *Florida Power* actually supports petitioner's position. *Florida Power* merely held that once an easement to use poles was granted by the pole owners to a cable company, the government could regulate the amount charged for the use of the easement; essentially, rent control. *Id.* at 251-54. As set forth in *Admiral's Cove*, when a landowner grants or sets apart an easement for utilities, the land-

owner has voluntarily given up that portion of the "private" property to someone else for utility use and has impliedly consented to or acquiesced in the use and occupation of that easement by the utility easement holder; a cable operator's use of that easement thus does not constitute a physical "taking." *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1530 (1992) ("Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals."). The Cable Act does not force or require the property owner to create, for cable operators, a utility easement for cable use, against the owner's consent. Since the landowner has already granted the easement, the Cable Act merely regulates the use of that easement; it does not permit forced permanent physical occupation of the owners' property.[22]

Given that § 621(a)(2) advances legitimate governmental interests and does not deprive the owner of all economically beneficial uses of the property, it does not effectuate a taking. This court should grant certiorari in this case to resolve this important constitutional question.

III. SECTION 621(a)(2) OF THE CABLE ACT PROVIDES FOR JUST COMPENSATION IN ANY EVENT

In the event that the Court determines that the cable operator's use of compatible easements would effectuate a taking, the Cable Act provides for just compensation. The district court below and the courts in *United Cable*, No. L89-30103 CA, slip op. at 6-7 (112a-114a), *Greater Worcester Cablevi-*

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22 Use regulations such as § 621(a)(2) do not constitute *per se* violations of the takings clause; rather, compensation is required only if the statute does not substantially advance legitimate state interests and denies an owner all economically beneficial use of the land. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *see also Lucas*, No. 91-453, 1992 WL 142517, at *7 (taking occurs when the owner of real property loses *all* economically beneficial uses in the property in the name of the public good); *Yee*, 112 S. Ct. at 1526 (in evaluating land use regulation a court should consider the purpose of the regulation, the extent to which it deprives the owner of economically viable use of the land and unfairly singles out the property owner to bear a burden that should be borne by the public as a whole).

sion, 682 F. Supp. at 1259, and *Centel Cable Television Co. of Florida v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 178 (S.D. Fla. 1988), expressly determined that the Cable Act does provide for just compensation. *See also Harmon*, 22 Golden Gate U. L. Rev. at 19 (arguing that § 621(a)(2) provides for just compensation).[23]

In fact, § 621(a)(2)(C) *expressly* provides for just compensation to the property owner. 47 U.S.C. § 541(a)(2)(c). Respondents argued below and the court of appeals suggests that § 621(a)(2)(C) does not provide for just compensation because proposed subsection (D), requiring the promulgation of regulations providing "methods for determining just compensation under this section," was not included in the final bill. *Woolley*, 867 F.2d at 157. That deletion supposedly evidenced Congress' intent to distinguish between just compensation for damages, which is included in § 621(a)(2)(C), and just compensation for the value of the property taken. That analysis misreads the relevant provisions and the legislative history.

The provisions that became subsections (A), (B) and (C) of § 621(a)(2) originally contained a draft subsection (D) which provided for the promulgation of regulations that would provide "methods for determining just compensation under this section." The reference to "this section" in draft subsection (D) could have only referred to subsection (C), which required, and still requires, "that the owner of the property be justly compensated by the cable operator for any damages . . . ." 47 U.S.C. § 541(a)(2)(C). The deleted subsection (D) did not provide an additional substantive right of just compensation. It merely provided for the promulgation of methods to determine the amount of just compensation otherwise due to the owner under subsection (C). Consequently, the omission of subsection (D) did not delete the right to just compensation granted to the owner under subsection (C). It merely omitted the promulgation by a governmental entity of methods to determine the just compensation that is otherwise

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23 The courts in *Woolley*, 867 F.2d at 158, and *Media General*, 737 F. Supp. at 909-11, have found that the Cable Act does not provide for just compensation.

due and left that determination for the court. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Florida Power Co. v. Federal Communications Comm'n*, 772 F.2d 1537 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987).

Thus, as determined by the court in *Greater Worcester Cablevision*:

> [the] claim that because an unenacted provision contained a more complicated compensation scheme that Congress changed its mind and did not, finally, intend for property owners to be compensated is not persuasive . . . . Except for the provision detailing a method for determining what constitutes just compensation, Section 621(a)(2) fully incorporates the compensation provisions of the unenacted Section 633.

Greater Worcester Cablevision, 682 F. Supp. at 1259.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 2, 1992

Respectfully submitted,
EUGENE R. SCHEIMAN
Counsel of Record
HOWARD GRAFF
NEAL S. BARLIA
FRANCIS S. CHLAPOWSKI
ADAM R. ALLAN
BAER MARKS & UPHAM
805 Third Avenue
New York, New York 10022
(212) 702-5700

Attorneys for Petitioner
Cable Holdings of Georgia, Inc.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 91-8032

FEB. 12, 1992

CABLE HOLDINGS OF GEORGIA, INC.,

Plaintiff-Appellee,

—v.—

MCNEIL REAL ESTATE FUND VI, LTD., Woodsong Apartments d/b/a Lakes Apartments, Robert A. McNeil Corporation, ODC Communications Corporation, Woodsong Associates, Ltd.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, TUTTLE, Senior Circuit Judge, and FULLAM*, Senior District Judge.

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* Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

BIRCH, Circuit Judge:

In this case we interpret Section 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1988) (the "Cable Act"). Section 621(a)(2) grants cable companies which have been franchised by a governmental franchising authority a right to access "public rights-of-way" and "easements . . . which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2) (1988). Below, appellee Cable Holdings of Georgia, Inc. d/b/a Smyrna Cable TV ("Smyrna Cable"), a franchised cable company in Cobb County, Georgia, brought an action pursuant to Section 621(a)(2) in the United States District Court for the Northern District of Georgia. Smyrna Cable sought to compel access to the interiors of the multi-unit apartment buildings then owned and operated by appellants McNeil Real Estate Fund VI, Ltd., The Robert A. McNeil Corporation, and Woodsong Associates, Ltd. (collectively, "McNeil"). Smyrna Cable reasoned that because McNeil had privately agreed to grant interior access to a telephone company, an electric company, and a competing video programming services provider, McNeil had "dedicated" compatible easements which were accessible by Smyrna Cable under Section 621(a)(2). The district court agreed with Smyrna Cable, ordering McNeil to allow the cable company to access and occupy the interior of McNeil's apartment buildings so that Smyrna Cable could maintain a cable system capable of serving the residents of those buildings.

We disagree with the district court's construction of the Cable Act. Initially, the district court's reading of Section 621(a)(2) violated a fundamental canon of statutory construction: courts must avoid any statutory interpretation which creates substantial constitutional difficulties. In ruling that Section 621(a)(2) authorized Smyrna Cable's physical occupation of McNeil's private property for which McNeil need not be compensated, the district court adopted a construction of the Cable Act which raises serious concerns under the Takings Clause of the Fifth Amendment. Congress does not have the constitutional power to authorize a permanent physical occu-

pation of an owner's private property. That principle would seem to apply *even when* a property owner has privately allowed other occupations which are "compatible" with a government-sanctioned invasion. Because the the district court's construction of Section 621(a)(2) created this difficult Fifth Amendment issue, we are reluctant to accept it.

Of course, if the the district court's interpretation was required by the text and legislative history of the Cable Act, we would be required to reach the constitutional question. However, our independent review of the relevant sources indicates that the admittedly ambiguous legislation at issue in this case is capable of being construed constitutionally: Section 621(a)(2) authorizes a franchised cable company's access to easements on private property only when the private property owner has dedicated those easements for the general use of any utilities. We adopt this reading of Section 621(a)(2) because it is consistent with our prior precedent and because it avoids the constitutional problems arising under the the district court's interpretation of the Cable Act. Since it is clear that the private property owner in this case has not dedicated easements within its buildings for the general use of all utilities, Section 621(a)(2) does not afford Smyrna Cable with a right to access and occupy McNeil's private apartment buildings. Accordingly, we REVERSE the judgment in favor of Smyrna Cable and REMAND the case so that the district court may enter judgment in favor of the appellants.

I. BACKGROUND

A. *Factual Background*

When this litigation began, McNeil owned and operated the Lakes Apartments and the Woodsong Apartments, two private complexes in Cobb County, Georgia. These complexes are comprised of separate multi-unit residential buildings and surrounding land. In 1980, McNeil entered into two contracts with Smyrna Cable for the provision of cable programming services to the residents of these complexes. Smyrna Cable constructed

its cable system and provided cable television services to McNeil's residents through the summer of 1985.

When Smyrna Cable's contracts expired, McNeil reached an agreement with a competing video programming services provider—appellant ODC Communications Corporation ("ODC"). Unlike Smyrna Cable, ODC is not a franchised cable company. Because all of ODC's equipment is located on private property and ODC's systems do not use or cross public rights-of-way, ODC is able to provide cable television services without obtaining a franchise from Cobb County. Of course, because the services provided by ODC and Smyrna Cable are substantially similar, the two companies compete for the same television subscribers. In this case, those subscribers are the occupants of McNeil's apartment buildings.

The contracts between McNeil and ODC specify that ODC is allowed to construct on McNeil's property a satellite dish receiver and a local television antenna. In addition, ODC is permitted to construct a cable system across and into McNeil's property. Currently, ODC's cable system is completely contained on McNeil's private property: the system runs from the satellite dish and antenna, to the apartment buildings, and eventually inside each building to the individual residential units. In addition, the residents of McNeil's apartments are also linked to electricity and telephone service. Both Georgia Power Company and Southern Bell Telephone and Telegraph Company have wiring which crosses McNeil's land in order to reach and access the interiors of McNeil's buildings.

B. *Procedural Background*

In August 1985, Smyrna Cable filed this action in order to regain access to the residents of McNeil's apartment buildings. Although Smyrna Cable's complaint asserted several theories in support of its alleged right to continue installing and operating its cable facilities at the Lakes Apartments and the Woodsong Apartments, the only remaining claim is Smyrna Cable's potential remedy under Section 621(a)(2) of the Cable Act. This section of the Cable Act provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses. . . .

47 U.S.C. § 541(a)(2) (1988). Smyrna Cable's complaint argued that McNeil had privately granted exterior and interior easements to three entities—ODC, Georgia Power, and Southern Bell. In addition, Smyrna Cable claimed that these easements were granted for uses which were compatible with the construction of its cable system because Smyrna Cable's wires and equipment could directly trace—"piggyback"—any of the other cables or wires already present on McNeil's property. Therefore, Smyrna Cable argued, Section 621(a)(2) provided it with a right to access and permanently occupy McNeil's property, without McNeil's consent, in order to compete with ODC for the potential television subscribers living in McNeil's buildings.

After discovery, the parties filed cross-motions for summary judgment. Smyrna Cable submitted briefing and evidence in support of the arguments pressed in its complaint. McNeil's defense to these allegations primarily consisted of two arguments. First, McNeil denied the existence of any easements on or within its property. McNeil claimed that ODC and the local utilities were permitted to access McNeil's property in order to provide services, but McNeil's permission did not take the legal form of an "easement" which would be accessible under the language of Section 621(a)(2). Second, McNeil asserted that even if there were easements in favor of ODC and the utilities, those easements were privately granted to particular entities, not dedicated to utility use in general. McNeil's position was that the Cable Act did not mandate access to such private easements. Alternatively, McNeil stressed that if Section 621(a)(2) did provide such a right of access, the provision must be declared unconstitutional because it effectively authorizes a taking of McNeil's private property without providing for just compensation.

In a series of orders, the district court ruled in favor of Smyrna Cable. First, the court found that private easements did exist on McNeil's property. Although the contracts between McNeil and ODC expressly denied the existence of any interior easements in favor of ODC, the court ruled that the physical presence of ODC's cable wires created easements under Georgia law. In addition, the court implicitly found easements in favor of Southern Bell and Georgia Power, ruling that Smyrna Cable could "piggyback its cable along easements that are actually occupied by telephone and electrical lines."[1] R7-111-7.

Second, the court concluded that Section 621(a)(2) allowed Smyrna Cable to access *any* easements, even easements privately granted by a property owner in favor of a particular entity. *See Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 678 F.Supp. 871, 873 (N.D.Ga.1986). The district court argued that because "[t]he language of [Section 621(a)(2)] contains no requirement that the easement be dedicated for public use," *Cable Holdings*, 678 F.Supp. at 873, Congress intended to allow "cable operators to piggy back their lines onto *both* public and private easements, provided those easements are dedicated for compatible uses." R7-111-3. Therefore, the court ordered that Smyrna Cable could construct a cable system across and inside McNeil's property, as long as Smyrna Cable directly followed the competing cable company's system, the electric wires, and/or the telephone lines.

Finally, the district court rejected McNeil's argument that such a forced occupation of McNeil's property constituted a compensable taking under the Fifth Amendment. *See* R8-135. The court apparently recognized that the Cable Act does not contain a just compensation provision.[2] Nevertheless, the court

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1 The district court's rulings regarding the existence of utility easements are less than clear. Fortunately, the district court's lack of clarity on this issue is not important. *See infra* note 3.

2 Although the Cable Act does provide that property owners be compensated for the *damages* caused by a franchised cable company, 47 U.S.C. § 541(a)(2)(C) (1988), the statute does not provide for just compensation for government *takings* of private property.

ruled that Congress could authorize a permanent physical occupation of private property without providing for just compensation, as long as the private property owner had granted compatible easements to other entities. Therefore, the district court declined McNeil's invitation to declare Section 621(a)(2) unconstitutional.

II. DISCUSSION

A. *The District Court's Interpretation Of Section 621(a)(2) Creates Substantial Constitutional Difficulties*

This court will avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction. This canon of statutory interpretation is well-established in the case law. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988); *United States v. Brown*, 731 F.2d 1491, 1494 (11th Cir.1984); *Federal Election Comm'n v. Florida For Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir.1982). The district court's construction of Section 621(a)(2) creates serious questions regarding the potential unconstitutional taking of McNeil's private property. Therefore, this court is wary of such an interpretation.

1. Government authorizations of permanent physical occupations violate the Takings Clause.

If Section 621(a)(2) authorized Smyrna Cable to construct its cable system on McNeil's private property regardless of the presence of any compatible easements, we would have little difficulty in finding the provision in violation of the Fifth Amendment. After all, under such facts Section 621(a)(2) would be indistinguishable from the New York statute analyzed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Loretto*, the New York law at issue provided that an owner of a multi-unit apartment building "must permit a cable television company to install its cable facilities upon his property." *id.* at 421, 102 S.Ct. at 3168. Writing for the Court, Justice Marshall con-

cluded that such a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426, 102 S.Ct. at 3171. Therefore, the Court remanded the case for a determination of the amount of compensation due the property owner.

Loretto, then, stands for the proposition that the government may not require (without providing for just compensation) a property owner to grant access to a third party so that the third party can permanently occupy the owner's premises. The rationale of *Loretto* is simple. The most fundamental private property right is the owner's ability to exclude others. *See, e.g., id.* at 433, 102 S.Ct. at 3175; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979). When the government appropriates an owner's right to exclude another's physical presence without paying the owner just compensation, the government violates the Takings Clause.

2. The district court interpreted Section 621(a)(2) in a manner which may usurp an owner's right to exclude.

Of course, the district court did not construe Section 621(a)(2) to permit a franchised cable company to access and occupy another's property under all circumstances. Rather, the court ruled that Section 621(a)(2) only permits such a physical occupation when the property owner has privately agreed to allow other occupations which would be compatible with a government-sanctioned occupation by a cable company. Given that the government may not appropriate a property owner's right to exclude, the takings issue created by the district court's interpretation is whether the government may appropriate the right to exclude whenever the owner selectively relinquishes that right by permitting a compatible occupation.

We decline to reach this takings issue today. We note only that if Section 621(a)(2) authorized such an occupation by a franchised cable company, this court would have substantial reservations regarding the constitutionality of the Cable Act. Crucial to our trepidation is the fact that the district court's

construction of Section 621(a)(2) effectively permits exactly the same occupation found impermissible in *Loretto*—the permanent physical presence of a franchised cable company inside private apartment buildings against the express wishes of the property owner. Because every modern apartment building is linked to electric, telephone, and/or video programming services, the district court's interpretation effectively grants franchised cable companies the same unencumbered right of access to private property which the Supreme Court held to be a compensable taking in *Loretto*. Indeed, in this case, McNeil could only prevent Smyrna Cable's physical occupation if McNeil also denied its residents the benefits of service from Georgia Power, Southern Bell, and ODC. We doubt whether the government may so condition a property owner's right to exclude. *Cf. Loretto*, 458 U.S. at 439 & n.17, 102 S.Ct. at 3178 & n. 17.

The government could not force a beachfront property owner to provide an easement in favor of the general public so that all could access the owner's beach. *See Nollan*, 483 U.S. at 831, 107 S.Ct. at 3145. Could the government instead legislate that if the beachfront owner allowed his neighbors to cross his beach, he must also allow the public at large to cross? Similarly, the state could not force landlords to allow third parties to build swimming pools on the rooftops of the landlord's apartment buildings. *See Loretto*, 458 U.S. at 436, 102 S.Ct. at 3176. Could the state instead pass a law providing that if a landlord set aside space for one swimming pool company, he must also allow access to that same space for a competing swimming pool company? Admittedly, these analogies are less than perfect. However, the illustrations adequately demonstrate the constitutional difficulties engendered by the district court's interpretation of Section 621(a)(2).

A property owner's right to exclude another's physical presence must be tenaciously guarded by the courts. The district court's resolution of this case failed to recognize this fundamental principle of private property. Because the district court's interpretation of Section 621(a)(2) creates significant constitutional problems regarding the government's ability to condition a property owner's right to exclude, we must search

for a construction of the Cable Act more consistent with the demands of the Takings Clause.

B. *Section 621(a)(2) Can Be Interpreted So As To Avoid These Substantial Constitutional Difficulties*

If Section 621(a)(2) expressly provided for the right of access asserted by Smyrna Cable, we would be required to reach the takings issue delineated above. However, our independent review of the relevant sources reveals that Congress did not intend for Section 621(a)(2) to reach as far as claimed by Smyrna Cable. The language and legislative history of Section 621(a)(2) indicates that the Cable Act does not provide a right to access wholly private easements granted by property owners in favor of particular utilities. Rather, Section 621(a)(2) only allows a franchised cable company to access easements on private property when the property owner has dedicated those easements for general utility use. In addition to being a sounder interpretation of Section 621(a)(2), our construction of the Cable Act is consistent with our prior cases in this area and avoids the constitutional problems caused by the district court's reading of Section 621(a)(2).

1. Congress did not intend for Section 621(a)(2) to reach wholly private easements so that franchised cable companies could access the interiors of private apartment buildings.

On its face, Section 621(a)(2) does not provide the right of access sought by Smyrna Cable.The provision does provide a right to access "easements . . . which have been dedicated for compatible uses," 47 U.S.C. § 541(a)(2) (1988), but it does not explicitly include wholly private easements in the class of easements accessible by franchised cable companies. In fact, the term "easement" is not defined anywhere in the statute. Because Smyrna Cable's claimed right to access *all* easements is so broad and so fraught with constitutional difficulties, we are reluctant to accept it unless Congress so provided with the clearest of language.

Moreover, the one word which does qualify the types of easements accessible by a cable company—"dedicated"—militates against Smyrna Cable's construction. Congress's use of the word "dedicated" at least suggests a reference to the legal meaning of "dedication." In general, an easement is legally "dedicated" only when the private property owner entirely relinquishes his rights to exclusion regarding the easement so that the general public may use the property. *See Black's Law Dictionary* 412 (6th ed. 1990). For example, a property owner who develops a subdivision will routinely "dedicate" corridors of land throughout the subdivision for general use by all utilities that service the subdivision. *See id.* at 413. Smyrna Cable does not suggest that McNeil legally "dedicated" easements to the public solely by privately allowing interior access to Georgia Power, Southern Bell, and ODC. Therefore, although not dispositive, the "dedication" language in Section 621(a)(2) seems to contradict Smyrna Cable's alleged right to access the private, non-dedicated easements which may exist on McNeil's property.[3] *See, e.g., Media Gen. Cable v. Sequoyah Condominium Council of Co-Owners*, 737 F.Supp. 903, 911 & n. 14 (E.D.Va.1990); *Cable Assocs. v. Town & Country Management Corp.*, 709 F.Supp. 582, 584-85 (E.D.Pa.1989).

Because the language of the statute is less than clear, we turn to the legislative history of the Cable Act. Our review of these sources also indicates that Smyrna Cable's interpretation of Section 621(a)(2) is erroneous. Most importantly, Congress included, and subsequently rejected, a form of the right of access claimed by Smyrna Cable. Proposed Section 633 of the Cable Act would have provided a franchised cable company with a right to access the interior of a multi-unit apartment building when service was requested by a tenant of the building, even if the property owner objected to the cable installa-

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3 As previously mentioned, McNeil disputes the existence of any easements on its property. McNeil argues that it allowed ODC, Georgia Power, and Southern Bell to access its buildings, but granted no entity a legal easement with respect to the interiors of its property. Because of our disposition of this case, we can assume without deciding that the access granted to ODC and the utilities are legal easements. This assumption renders moot the appellants' motion to strike, which was carried with the case.

tion. *See* H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984); H.R.Rep. No. 934, 98th Cong., 2d Sess. 79-81, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4655, 4716-18.

Section 633, which, interestingly enough, *did* contain a just compensation provision in recognition of the Supreme Court's decision in *Loretto*, was ultimately rejected by Congress. *See, e.g.*, 130 Cong.Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields). Therefore, Smyrna Cable's claimed right to access the interiors of multi-unit apartment buildings is belied by the fact that Congress considered and rejected a similar right of access. This court is reluctant to assume that Congress intended to encompass *sub silentio* in Section 621(a)(2) what it expressly rejected in proposed Section 633. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 107 S.Ct. 1207, 1219, 94 L.Ed.2d 434 (1987). "The fact that section 633 was not part of the [Cable] Act as it ultimately emerged from Congress is a strong indication that Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable service to apartment dwellers." *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 156 (3d Cir. 1989).[4]

In support of its alleged right to access and occupy McNeil's apartment buildings, Smyrna Cable relies heavily upon this passage of legislative history:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. . . . Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which

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4 The *Cable Investments* opinion contained a more thorough analysis of the legislative history surrounding the enactment of Section 621(a)(2). *See* 867 F.2d at 153-59. In this analysis, the court conclusively demonstrated that Congress did not intend to provide a right to access the interiors of private multi-unit apartment buildings.

> have been granted to other utilities are in violation of this section and not enforceable.

H.R.Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4655, 4696. In essence, Smyrna Cable alleges that McNeil's private access agreements with ODC, Georgia Power, and Southern Bell are unenforceable arrangements which seek to restrict Smyrna Cable's use of the easements which may exist on McNeil's property.

Smyrna Cable's reliance upon this passage begs the question. Granted, the passage does illuminate that Congress intended to nullify any private agreements which sought to deny a cable company's access to *dedicated* easements. But the passage does not speak to the crucial issue in this case—whether or not the alleged easements in favor of ODC, Georgia Power, and Southern Bell are "dedicated" easements within the meaning of Section 621(a)(2). As previously discussed, the text and legislative history of the Cable Act indicates that Section 621(a)(2) does not encompass private easements which allow particular utilities to access apartment buildings. Therefore, McNeil's private agreements with ODC and the utilities do not violate the passage of legislative history cited by Smyrna Cable, even though those agreements may effectively exclude Smyrna Cable. *See Cable Investments*, 867 F.2d at 155 (rejecting a franchised cable company's argument grounded upon the same passage of legislative history). Simply put, McNeil's agreements do not "seek to restrict a cable system's use of [*dedicated*] easements or rights-of-way which have been granted to other utilities." H.R.Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4655, 4696 (emphasis added).

Finally, Smyrna Cable's policy arguments are insufficient to support its claimed right of access under Section 621(a)(2). Smyrna Cable argues that allowing access to the interiors of McNeil's apartment buildings will further the Cable Act's goal of enhanced competition in the cable industry, primarily because Smyrna Cable would be able to compete with ODC for the customers living in McNeil's buildings. In rebuttal, McNeil and ODC contend that Smyrna Cable's construction of

Section 621(a)(2) would actually be anticompetitive because the alleged right of access to apartment buildings would only be enforceable by *franchised* cable companies, leaving non-franchised cable companies (such as ODC) at a distinct disadvantage. In other words, the appellants envision this unequal regime: Smyrna Cable is free to reach exclusive arrangements with property owners without fearing competition from companies such as ODC, but ODC cannot reach similar exclusive arrangements because Smyrna Cable could always enforce its alleged right of access under the Cable Act.[5]

We express no opinion on the complicated empirical question of which construction of Section 621(a)(2) best promotes competition in the cable industry. We note only that the policy arguments advanced by the parties were not squarely considered by the legislature when it enacted Section 621(a)(2).[6] Therefore, those arguments are insufficient to alter our construction of the Cable Act.

2. Our construction of Section 621(a)(2) is consistent with prior precedent and avoids the constitutional problems created by the district court.

This court has rendered two prior opinions interpreting the language of Section 621(a)(2). In *Centel Cable Television Company v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir.1988), we ruled that a franchised cable company has an implied right to sue in federal court whenever it is denied access to dedicated utility easements.[7] *See id.* at 1364.

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5 Even proposed Section 633 would not have created this unequal regime. Under the rejected language, a franchised cable company would not have a right to access an apartment building if the property owner offered "equivalent" cable television services. *See* H.R. No. 4103, 98th Cong. 2d Sess. § 633(h)(1) (1984).

6 We also believe that it would be odd if Congress intended to sanction exclusive agreements when negotiated by franchised cable companies, while at the same time outlawing similar exclusive arrangements when negotiated by non-franchised cable companies.

7 We decline the appellants' invitation to revisit the question of whether Section 621(a)(2) provides an implied cause of action.

In *Centel Cable Television Company v. Thos. J. White Development Corporation*, 902 F.2d 905 (11th Cir.1990), we held that the developer of a residential subdivision could not defeat a cable company's right to access the easements dedicated by the property owner for utility use throughout the subdivision. Therefore, we concluded that the franchised cable company could traverse the private roads in the development in order to effectuate the cable company's right to access the dedicated utility easements. *See id.* at 908-09. Smyrna Cable contends that *Admiral's Cove* and *Thos. J. White* dictate a ruling in its favor in this case.[8]

We disagree with Smyrna Cable's reading of these two cases. The crucial distinction between these two cases and the present case is the types of easements involved. Both *Admiral's Cove* and *Thos. J. White* involved the *dedicated* utility easements which are typically granted before a private property owner begins the development of a new residential subdivision. *See Admiral's Cove*, 835 F.2d at 1360; *Thos. J. White*, 902 F.2d at 907. In both cases, the developer of the property dedicated utility easements by recording (with the appropriate governmental authority) plats showing the corridors of land available for general utility use. *See Admiral's Cove*, 835 F.2d at 1360; *Thos. J. White*, 902 F.2d at 907, 910. In both cases, the property developer was required by Florida law to dedicate these corridors of land for general utility use. *See* Fla.Stat. ch. 177.081 (1991); *id.* ch. 177.091(29). In both cases, we determined that these utility easements—dedicated to the public for general utility use—were precisely the types of easements accessible by a franchised cable company pursuant to Section 621(a)(2).

In sharp contrast to *Admiral's Cove* and *Thos. J. White*, the alleged easements at issue in the present case are not easements dedicated by the developer of a residential subdivision for general utility use. McNeil has not recorded plats showing corri-

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8 Although *Admiral's Cove* cited the district court's opinion in the present case, *see* 835 F.2d at 1362, this court has never affirmed the district court's holding that Smyrna Cable could access and occupy the interiors of McNeil's apartment buildings. Smyrna Cable's suggestion to the contrary must be rejected.

dors of property available for general use by utilities seeking to access the interiors of McNeil's apartment buildings. Rather, through private negotiation and agreement, McNeil has allowed particular entities to cross its land and enter its buildings in order to provide service for the tenants of the buildings. These access rights are not dedicated easements within the language of Section 621(a)(2) and within the scope of our interpretations of that language in *Admiral's Cove* and *Thos. J. White*. For this reason, the holdings in *Admiral's Cove* and *Thos. J. White* are not apposite to the facts of this case and do not support Smyrna Cable's claimed right to access and occupy the interiors of McNeil's private apartment buildings.[9] Accordingly, we hold that although Section 621(a)(2) authorizes a franchised cable company's right to access dedicated utility easements within a residential subdivision (as in *Admiral's Cove* and *Thos. J. White*), the Cable Act does not authorize a cable company to access private, non-dedicated easements which may exist so that particular utilities can access the interiors of multi-unit apartment buildings.[10]

In addition to clarifying our prior cases in this area, our holding also avoids the constitutional difficulties created by the dis-

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9 We recognize that these prior cases contain broad language which could be construed as favoring Smyrna Cable's interpretation of Section 621(a)(2). Without exception, this broad language is not necessary for the *holdings* in *Admiral's Cove* and *Thos. J. White*. We are confident that, in spite of this broad language, these opinions neither contemplated nor approved the power of a franchised cable company to force its way onto private property, over the objection of the property owner, so that the cable company could permanently occupy the owner's apartment buildings and provide competing television service to the owner's tenants. Accordingly, we expressly limit *Admiral's Cove* and *Thos. J. White* to the facts involved in those cases.

10 Acceptance of Smyrna Cable's construction of the Cable Act would be an unwarranted extension of the holdings in *Admiral's Cove* and *Thos. J. White*. Under Smyrna Cable's logic, the cable company's access in these two cases would not be restricted to the dedicated utility easements which abutted the private property edge of the single family home lots. If a homeowner in one of the subdivisions desired telephone or electrical service, Smyrna Cable's interpretation of Section 621(a)(2) would also allow the franchised cable company to cross the homeowners's front yard and permanently occupy the interior of the homeowner's residence—even if the homeowner wanted no cable television service at all.

trict court's interpretation of Section 621(a)(2). As mentioned earlier, in ruling that the Cable Act allowed Smyrna Cable to physically occupy McNeil's private property, the district court raised serious concerns under the Takings Clause because the government may not appropriate an owner's right to exclude another's physical presence. By limiting the language of Section 621(a)(2) to those easements which are dedicated by the developers of residential subdivisions, we eliminate these substantial Fifth Amendment concerns. When a property developer dedicates corridors of land for general utility use, the government may lawfully designate franchised cable companies as users without appropriating an owner's right to exclude because *through dedication the property owner has voluntarily relinquished his right to exclude particular users.*[11] Therefore, in addition to being fairer to the text and history of Section 621(a)(2), our construction harmonizes our prior cases

11 Our prior jurisprudence in this area implicitly recognized this distinction. In *Admiral's Cove*, we solved the takings issue posed by *Loretto* by explaining that "most developers voluntarily grant easements for use by utilities, [therefore], Congress may force the developer to allow a cable franchise to use the easement without offending the taking cause [sic] of the Constitution. Such 'voluntary' action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user." *Admiral's Cove*, 835 F.2d at 1363 n. 7 (citation omitted); *see also Thos. J. White*, 902 F.2d at 909-10 (relying upon this footnote to resolve the property owner's takings argument).

It is unfortunate that we never pinpointed the critical fact: in both *Admiral's Cove* and *Thos. J. White*, the property owner *voluntarily* relinquished its rights of exclusion by dedicating utility easements via plat recordation. However, it is possible that the *Admiral's Cove* panel was hinting at the critical distinction—voluntary acquiescence to occupations—by its citation to *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Florida Power* stands not for the unacceptable proposition that the government may appropriate an owner's right to exclude, but for the narrower principle that once an owner relinquishes his exclusion rights, the government's regulatory abilities are greatly enhanced. *See id.* at 251-53, 107 S.Ct. at 1111-12. In *Florida Power*, the owner's voluntary relinquishment was its invitation to the cable company to occupy space on the owner's utility poles. *See id.* In *Admiral's Cove* and *Thos. J. White*, the owners' relinquishment was accomplished when easements were dedicated for general utility use.

and satisfies the canon of statutory interpretation which seeks to avoid constitutional difficulties.[12]

III. CONCLUSION

Today we have endeavored to clarify both Section 621(a)(2) of the Cable Act and our prior decisions defining the right of access granted by this provision. In order to avoid substantial constitutional problems and in order to be consistent with our prior decisions in this area of the law, we have concluded that Section 621(a)(2) provides a franchised cable company with the right to access only those easements which have been dedicated for general utility use, whether by plat recordation for a residential subdivision or otherwise. The alleged easements existing on McNeil's property have not been dedicated by McNeil for general utility use. Rather, these easements were privately granted by McNeil in order to allow limited rights of access to particular entities. Therefore, under Section 621(a)(2) of the Cable Act, Smyrna Cable has no right to forcibly access and occupy those easements.

Accordingly, we REVERSE the decision of the district court in favor of Smyrna Cable and REMAND the case so that the district court may enter judgment in favor of the appellants.

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12 We note that two other courts have adopted this construction of Section 621(a)(2) in order to avoid the constitutional difficulties inherent in the district court's interpretation. *See Cable Investments*, 867 F.2d at 159-60; *Cable Assocs.*, 709 F.Supp. at 585-86.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 85-3712
FILED SEPTEMBER 18, 1985

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

Plaintiff,

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS AND WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORP.

Defendants.

ORDER

This action came before the court on the plaintiff's motion for a temporary restraining order. Plaintiff seeks to enjoin the defendants from (1) removing, relocating or disconnecting any of the plaintiff's equipment, (2) preventing the plaintiff from maintaining or servicing its cable system, and (3) interfering with the plaintiff's operation of its system. During argument before the court, counsel for the defendants agreed that the defendants would make a good faith effort not to damage or interfere with the plaintiff's operations. Based upon this agreement, the court denied the plaintiff's motion. The court, however, directed the parties to file additional briefs.

It is not entirely clear at this time whether the parties wish to present additional evidence with respect to the plaintiff's motion for a preliminary injunction. Accordingly, the court will direct the parties to indicate to the court whether a hearing is desired, and if so, what evidence will be presented. If the court concludes that a hearing is not warranted, the court will enter an order with respect to the plaintiff's motion for a preliminary injunction based upon the pleadings and affidavits submitted.

Accordingly, the parties are ORDERED to respond as directed above within seven (7) days of the date of entry of this order.

SO ORDERED, this 17 day of SEPTEMBER, 1985.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C 85-3712A
FILED DECEMBER 27, 1985

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION and CORPORATION

ORDER

This matter is before the court on the plaintiff's motion for a preliminary injunction. Rule 65, Fed. R. Civ. P. The matter initially came before the court on the plaintiff's motion for a temporary restraining order. The court denied this motion on the basis of an agreement by defendants' counsel that a good faith effort would be made not to damage or interfere with the plaintiff's operations. In an order dated September 17, 1985, the court directed the parties to indicate whether a hearing on the instant motion was desired for the purpose of presenting additional evidence. Both parties have now replied that an evidentiary hearing is not required, although the plaintiff has asserted that oral argument could be helpful. In view of the lengthy pleadings already submitted, the court does not believe that additional oral argument is necessary.

In the instant motion, plaintiff seeks to enjoin the defendants from (1) removing, relocating, or disconnecting any of the cable or electronic equipment utilized by the plaintiff to serve its customers at the Lakes and Woodsong Apartments; (2) preventing the plaintiff, its employees or contractors from entering the Lakes and Woodsong Apartments to maintain or service its cable television system; and (3) interfering in any manner whatsoever with the plaintiff's operation of its cable television system at the Lakes and Woodsong Apartments. For the reasons that follow, the court will deny this motion.

I. Background Facts

Plaintiff Cable Holdings of Georgia, Inc., d/b/a Smyrna Cable TV ("Cable Holdings"), is a Georgia corporation which installs and operates a community antenna television system ("CATV System") in a portion of Cobb County, pursuant to a non-exclusive franchise issued by Cobb County. Through this system, plaintiff provides broadcast television and other non-broadcast signals via coaxial cable to subscribers. Defendant McNeil Real Estate Fund VI, Ltd., and defendant Robert A. McNeil Corporation (hereinafter referred to jointly as "McNeil") either own or operate two apartment complexes in Cobb County known as the Lakes Apartments and Woodsong Apartments. Defendant ODC Communications Corp. ("ODC") is a private cable system operator.

On February 20, 1980, the plaintiff and McNeil entered into a contract for the provision of Cable services to tenants at the Lakes Apartments. The agreement was to continue for a term of five years. Among other things, the contract provided that plaintiff would install cable service in any residential unit whose resident requested such service. Plaintiff was granted the right to charge these tenants rates based on similar services provided in the franchise area. The contract also provided as follows:

> Owner hereby grants and conveys to Cable, its successors and assigns for the Term of this Agreement as provided in Paragraph 6 hereof, a right-of-way and easement upon, along, under and across all that tract of land more fully

> described on Exhibit A . . . together with the right, privilege and easement to go in and upon the Premises, all of the foregoing being solely for the purpose of burying, constructing, operating, inspecting, repairing or maintaining, for the Term of this Agreement as provided in Paragraph 6 hereof, upon said right-of-way Cable's lines for transmitting CATV and pay television signals. . . .
>
> During the term of this Agreement, Owner grants to Cable the exclusive right to provide to the premises cable television services and agrees that it shall permit no other cable television operators to service the premises or any residential unit thereon. The system shall be and remain the property of Cable regardless of whether it, or portions thereof, become fixtures. Immediately following the termination of this Agreement, Cable shall, at Owner's request, remove the system, or any portion thereof, from the premises, and repair and restore all damage done to the premises in the process of such removal.

The Lakes Contract expired on February 20, 1985. Since the expiration of the contract, plaintiff has continued to provide cable services to the tenants at the Lakes. Although McNeil considered asking the plaintiff to remove its system, such request has apparently not yet been made. McNeil has asserted that it decided not to make this request until a new cable system is in place.

On April 21, 1980, plaintiff entered into a contract with Woodsong Apartments to provide cable service to tenants at the Woodsong Apartments. The Woodsong contract provided for a term of three years and could thereafter be terminated by either party upon 60 days written notice. Plaintiff continues to provide cable service to tenants at the Woodsong Apartments at this time. Defendants have not presented the court with evidence of a written termination of this contract.

On April 29, 1985, McNeil entered into a contract with ODC whereby ODC would provide cable services to residents of the Lakes and Woodsong Apartments. Defendants assert that ODC, as a private Cable operator, does not need to have a fran-

chise from the county to operate a cable system. ODC operates what is known as a satellite master antenna television system ("SMATV"). The system includes satellite antenna reception which is connected by coaxial cable to individual apartments. ODC began construction of its SMATV system at the two complexes in August. ODC gave the following notice to the tenants:

> ODC Communications is beginning construction of your new Cable TV System. During the construction period, you may experience minor inconveniences. Please excuse us as we try to bring you the very best in TV entertainment, including news, sports and childrens programming, together with HBO & Cinemax.
>
> Thank you for your understanding and cooperation. You will receive more information shortly concerning programming, pricing and the cable package your management company will be providing to you as a valuable resident.

Plaintiff alleges that ODC's construction work has damaged plaintiff's cables and has resulted in outages of service to plaintiff's subscribers. Plaintiff also alleges that ODC workmen have at times disconnected plaintiff's lines to subscriber's television sets.

There is a certain amount of dispute between the parties as to the location of plaintiff's cable lines in relationship to other services, such as utility lines and the cable lines to be laid by ODC. Plaintiff has submitted an affidavit by Jeffery Parker, plaintiff's local manager, who states that

> In addition to following the easements granted to the plaintiff and ODC at the Lakes and Woodsong Apartments, the plaintiff's CATV lines follow or "piggyback" the easements granted to the power company (Georgia Power Co.) and the telephone company (Southern Bell). More particularly, at the Lakes Apartments, the plaintiff's CATV wires are "fished" into the walls of the apartments just as are the wires of the power and telephone company.

Defendants have responded with an affidavit by Robert C. Chilton, McNeil's regional vice-president, who asserts that Southern Bell and Georgia Power have never been granted easements internal to the buildings at the complexes. Chilton also states that in certain areas, plaintiff's lines do not follow either the Southern Bell or Georgia Power lines. In its letter pleading of October 3, 1985, plaintiff apparently recognizes that its cable lines do not exactly trace the cable lines of ODC or the Georgia Power or Southern Bell lines but instead asserts that these rights of way or easements are within the area to be served by the cable system.

II. Discussion

The factors which must be met before a court will issue a preliminary injunction are well settled. Plaintiff must establish (1) that there is a substantial likelihood of success on the merits; (2) that the movant will suffer irreparable harm unless the injunction is issued; (3) that the threatened injury to the movant outweighs the damage which an injunction would cause the opposing parties; and (4) that granting the injunction would not disserve the public interest. The motion must be denied if the moving party fails to establish any one of these factors.

A. Likelihood of Success

Plaintiff sets forth two arguments in support of its contention that it is likely to prevail on the merits. First, plaintiff asserts that it has a perpetual easement under Georgia law to operate and maintain a cable system at the two complexes. Second, plaintiff asserts a right of access based on section 621(a)(2) of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. § 541(a)(2).

1. Perpetual Easement

Plaintiff argues that it has an irrevocable easement to continue providing cable services pursuant to Off'l Code Ga. Ann. § 44-9-4:

> A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land.

Plaintiff acknowledges that the cable systems were initially installed pursuant to the written contracts but it contends that at this point, the contractual rights have ripened into easements.

With respect to the Lakes complex, plaintiff points out that since the expiration of the contract, McNeil has not asked plaintiff to remove its system but rather, has allowed the plaintiff to provide service, to make repairs, and to make new installations. Plaintiff notes that McNeil has continued to allow the plaintiff access to tenants' apartments and has provided information to tenants concerning plaintiff's system. Plaintiff asserts that it has incurred additional expenses since the expiration of the Lakes contract, in particular, the cost of installation for new subscribers. Plaintiff argues that in light of McNeil's acquiescence and cooperation with plaintiff's business activities, McNeil should be estopped from denying that plaintiff's rights have ripened into an easement running with the land.

In regard to the Woodsong Apartments, plaintiff asserts that it has been granted an easement under the contract and that this contract has not been terminated. In addition, plaintiff argues that even if the contract is terminated, plaintiff's provision of service and expenditure of money past the initial three year term demands that it be allowed to continue to provide such services.

The court has reviewed the evidence submitted and the arguments raised by the parties and concludes that the plaintiff has not shown a substantial likelihood that it will prevail on this issue. The Georgia Supreme Court has explained that section 44-9-4, formerly Georgia Code § 85-1404, "is operative only where there is an express oral license. It does not apply to implied licenses nor is it susceptible to such an interpretation. the statute will not be extended beyond its plain terms so as to

establish irrevocable property rights in another's land under an implied license." *Berolzheimer v. Taylor*, 230 Ga. 595, 198 S.E.2d 301 (1973). Thus, under the terms of the statute, an easement running with the land is created only when there is an express oral license pursuant to which expenses have been incurred.

Plaintiff's rights in the instant case have been created pursuant to written contracts. The Lakes contract established a term of five years and expired in February. Although the plaintiff has continued to provide service since February, the court does not believe that the plaintiff has established the existence of an express oral license. Plaintiff points out that McNeil has not requested that plaintiff vacate the premises but rather, has allowed the plaintiff to continue servicing its system and to make new installations. Plaintiff also asserts that McNeil has allowed plaintiff continued access and has provided information to tenants about plaintiff's cable system. The court believes that while these actions or inaction by McNeil may give rise to an implied license, they do not constitute the express oral license which is required by the statute in order to create an easement running with the land. Plaintiff has not presented evidence of an express oral agreement which would give rise to a perpetual easement.

With respect to the Woodsong Apartments, it appears that the plaintiff at this time is continuing to provide cable service under the terms of the contract. Insofar as the plaintiff asserts a right to provide such service in perpetuity, the court notes that the agreement gives the owner the right, upon expiration of the initial three year term, to terminate the agreement upon sixty days written notice. Again, the plaintiff has not presented evidence of an express oral agreement giving rise to an easement running with the land.

2. The Cable Act

Plaintiff asserts that it has a right of access to provide cable services to the apartment complexes under section 621(a)(2) of the Cable Act, which provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
>
> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
>
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

Plaintiff points out that one of the purposes of the Cable Act is to ensure that apartment dwellers are not denied access to diverse information sources by a landlord who acts as an editor by denying access to cable operators. *See* 1984 U.S. Code Congressional and Administrative News 4673.

Plaintiff argues that under the terms of the Cable Act, it is authorized to construct its cable system over any public right-of-way or through any easement which is within the area to be served by the Cable System and which has been dedicated for compatible use. Initially, plaintiff contended that its cable lines follow or piggy-back easements granted Georgia Power or Southern Bell. *See* Supplemental Affidavit of Jeffery Parker at ¶ 11. This assertion was contradicted by the defendants in a supplemental affidavit submitted by Robert Chilton. In its October 3 letter pleading, plaintiff argues that its cable lines need not exactly trace other easements granted by McNeil so long as such easements are within the area to be served by the cable system. Plaintiff also asserts that as a practical matter, it appears that ODC and the utilities have been granted easements internal to the buildings which are followed by plaintiff's cable

lines. Defendants reply that to the extent plaintiff's cable lines do not follow compatible easements, section 621(a)(2) is, by its terms inapplicable.

The Congressional purpose behind section 621(a)(2) is explained in the House Report, which states as follows:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. Such use is subject to the standards set forth in section 633(b)(1)(A), (B) and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.

1984 U.S. Code Congressional and Admin. News 4696.

Thus, under this code section, it would appear that the plaintiff would be authorized to construct a cable system at the apartment complexes so long as the system follows public rights-of-way or easements within the area to be served and which have been dedicated for compatible use. The court believes that is not sufficient that there simply be compatible easements within the area to be served by the cable system. Rather, the statute requires that the cable system be constructed over such rights of way or through the easements. To the extent that the system does not follow such rights-of-way or easements, the system does not fall within the purview of this code section.

The court finds that the plaintiff has not met its burden of demonstrating a substantial likelihood that it will prevail on the merits on this issue. As noted, McNeil has presented evidence that plaintiff's cable lines do not follow the easements granted Georgia Power or Southern Bell. Plaintiff apparently recog-

nizes that its cable lines do not follow these easements and instead argues that the easements are within the area. As discussed above, however, the express language of the statute requires that the cable system be constructed over public rights-of-way or through easements. Plaintiff has not clearly established that it will likely prevail on this issue.

The court notes that the instant decision is limited to consideration of the likelihood of success and is not conclusive with respect to a final determination on the merits. *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774 (11th Cir. 1984). Thus, this decision does not foreclose the plaintiff from demonstrating at trial that its cable lines in fact follow other easements which have been dedicated for compatible uses.

B. Irreparable Harm

Plaintiff argues that it will suffer irreparable injury if an injunction is not issued for several reasons. Plaintiff asserts that it will be unable to provide services to the tenants at the complexes and, in the absence of an injunction, will be foreclosed from competing for business with ODC. Plaintiff also argues that the inability to serve its customers will cause it to lose goodwill and will impair its relationship with the County. Even if plaintiff ultimately prevailed on the merits, plaintiff asserts that it would have been irreparably injured because it would be unable to determine how many customers and how much good will it has lost in the interim.

The court believes that if plaintiff prevails it can be adequately compensated by monetary damages and thus, the issuance of an injunction is not appropriate. If plaintiff ultimately prevails, it would be authorized to compete with ODC for the business of the tenants. The court believes that any interim loss of business could be determined and compensated by a damage award. Plaintiff could also present evidence regarding possible future losses which would result from any disruption of its services. Because the court concludes that any temporary inability to provide cable services could be compensated by monetary relief, the court must deny the motion for a preliminary injunction.

Accordingly, plaintiff's motion for a preliminary injunction is DENIED.

SO ORDERED, this 27 day of DECEMBER, 1985.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C85-3712A
FILED FEBRUARY 18, 1986

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORPORATION

ORDER

This matter is before the court on the plaintiff's motion for a stay pending appeal of this court's order of December 27, 1985, which denied the plaintiff's motion for a preliminary injunction. Rule 62, Fed. R. Civ. P. Plaintiff seeks to enjoin the defendants from taking any action which would prevent the plaintiff from providing cable service to subscribers, or in the alternative, from taking any action which would cause the removal of plaintiff's physical plant.

In the December 27 order, the court recognized that under the Cable Act, plaintiff could likely succeed in establishing a right of access insofar as its system is constructed "over public rights-of-way and through easements, which is within the area to be served by the cable system and which have been ded-

icated for compatible uses. . . ." Because the plaintiff's system does not completely follow rights-of-ways or easements, the court concluded that plaintiff was not likely to succeed on the merits and, accordingly, denied its motion. The court also held that plaintiff could be adequately compensated by monetary damages if it succeeded on the merits at trial. Plaintiff's motion for a stay sets forth essentially the same arguments previously presented to the court. Because the court is not persuaded that a different result should be reached, plaintiff's motion is hereby denied.

SO ORDERED, this 14 day of FEBRUARY, 1986.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C85-3712A
FILED OCTOBER 10, 1986

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

—vs.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORPORATION

ORDER

This action is before the court on cross-motions for summary judgment and on plaintiff's motion to add a party. Defendants do not oppose plaintiff's motion to add a party, so the court will grant such motion.[1]

The facts of this case were set out in detail in the court's December 27, 1985, order. Briefly, plaintiff Cable Holdings of Georgia, Inc. ("Cable Holdings"), installs and operates a cable television system in Cobb County, Georgia, pursuant to a non-

1 Plaintiff and defendants are willing to have the court's ruling on the cross-motions for summary judgment apply to Woodsong Associates, Ltd., whom plaintiff seeks to add as a defendant. Thus, this order will apply to defendant Woodsong unless Woodsong objects within 20 days of the date of entry of this order.

exclusive franchise issued by Cobb County. Defendant McNeil Real Estate Fund VI, Ltd. ("McNeil Fund") owns an apartment complex known as The Lakes Apartments. Defendant Woodsong Associates, Ltd. ("Woodsong") owns a complex known as The Woodsong Apartments. Defendant Robert A. McNeil Corporation ("McNeil Corporation") manages both apartment complexes. Plaintiff, pursuant to separate contracts with defendants, provided cable services to the tenants of the two apartment complexes. Both contracts were of limited duration, and on August 28, 1985, defendants gave plaintiff notice of termination of the Lakes contract effective immediately and of the Woodsong contract effective October 27, 1985.

The parties have filed cross-motions for summary judgment on plaintiff's claim that the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 421-559, (Supp. III 198?) ("The Cable Act"), provides plaintiff with a right of access to serve the tenants at the Lakes and Woodsong Apartments. Plaintiff contends that section 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), permits it to continue service through the system as currently constructed at the apartment complexes or to reconstruct the system through compatible utility easements.

Defendants respond that section 621(a)(2) grants to cable system operators a very limited right of access and that plaintiff has not and cannot use that right of access to provide service to the tenants over the objections of McNeil Fund and Woodsong. Under defendants' view, Congress granted to cable system operators a right to construct their systems over public rights-of-way and through *publicly-dedicated* easements. Defendant argues that plaintiff and other cable operators cannot construct their systems through easements that have not been publicly dedicated without violating the constritutional right of property owners to just compensation for any taking of their property.

1. *Right of Access Under Section 621(a)(2)*

Defendants' and plaintiff's arguments essentially turn on whether Congress intended a cable franchise operator to have a federal statutory right under section 621(a)(2) to run its

cables across a landlord's property and into an apartment dwelling despite the landlord's objections. Section 621(a)(2) provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
>
> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
>
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

Defendants's argument that section 621(a)(2) grants a right to construct only through publicly-dedicated easements must be rejected. The language of the section contains no requirement that the easement be dedicated for public use. Moreover, defendants have not pointed to any legislative history supporting their strained interpretation of section 621(a)(2). Defendants' argument that section 621(a)(2) is unconstitutional if the court adopts plaintiff's interpretation also must be rejected. To do so, however, requires an examination of the legislative history of that section and of unenacted section 63.

Section 633 of the original House version of the Cable Act would have explicitly prohibited a landlord from interfering with the construction or installation of any cable system facility necessary to providing cable service, if such service had been requested by a tenant. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 114 (1984). Section 633(b) would have required states

and local franchising authorities to prescribe regulations relating to the protection of the landlord's interests, including provisions for manner of installation and just compensation.[2] Subsection (d) would have required the regulations regarding just compensation to address certain factors, including

> (1) the extent to which the cable system facilities physically occupy the premises;
>
> (2) the actual long-term damage which the cable system facilities may cause to the premises;
>
> (3) the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and
>
> (4) the enhancement in value of the premises resulting from the availability of services provided over the cable system.

Id. at 115. Subsection (h) would have provided that the federal right of access conferred by section 633 would not apply in those situations where the landlord provided the tenant the ability to obtain a diversity of information sources equivalent to those offered by the cable system franchised to provide cable service in that given area. *See id.*

Section 633 was removed during the House-Senate conference on the bill that became the Cable Act. *See* Meyerson, The Cable Communications Policy Act of 1984: A Balancing Act on Coaxial Wires, 19 Ga. L. Rev. 543, 610 (1985). Thus, plaintiff argues that its right of access arises under section 621(a)(2), which incorporated the standards formerly included in section 633(b) regarding the cable operator's use of compatible easements. *See* section 621(a)(2)(A), (B), and (C), *supra*, for the standards formerly included in section 633(b).

As noted in the court's December 27, 1985, order denying a preliminary injunction, the congressional purpose behind section 621(a)(2) was explained in the House Report:

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2 Actually, Section 633 would have required only the FCC to adopt these regulations. If the state or local franchising authority failed to prescribe regulations, then the FCC regulations would apply in that locality. *See id.* at 115.

> Subsection 621(a)(2) specifies that any franchise issued to a cable system [sic] authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. Such use is subject to the standards set forth in section 633(b)(1)(A), (B), and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 29, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4698. Thus, Congress intended *section 621(a)(2)* to create the right of access; section 633 merely contained the standards governing the exercise of that right. During the House-Senate conference on the bill, those standards were transferred to section 621(a)(2) when section 633 was deleted.

The issue of whether section 621(a)(2) provides for just compensation is a difficult one.[3] Section 633 had included a provision detailing a method for providing just compensation. That provision was in addition to the provisions in 633 requiring compensation for the damages caused by the installation, construction, operation, or removal of the cable facilities. Because Congress recognized that just compensation would be required when a cable operator constructed its system across an objecting landowner's property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982), Congress intended section 633 to comply with the constitutional requirements. *See* H. R. Rep. No. 934, 98th cong., 2d

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3 If Congress did not provide for just compensation for the taking of property that might occur when a cable operator exercises its right of access, then section 621(a)(2) either (1) would be unconstitutional or (2) cannot be found to grant the access right plaintiff claims it does.

Sess. 80-81, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4717-18.

Congress transferred the compensation-for-damages provision to section 633. Congress did not, however, transfer the provision that outlined a method of just compensation for any taking of property that might occur. *Compare* section 633(b), (d), H. R. Rep. No. 934, at 114-15 *with* section 621(a)(2), 47 U.S.C. § 541(a)(2). One district court that considered the matter concluded that the language of section 621(a)(2) and the legislative history of the Cable Act indicate that Congress intended compensation to be paid for any taking. *See Greater Worcester Cabelvision, Inc. v. Carabetta Enterprises, Inc.*, C85-2022MA (D. Mass. November 20, 1985). This court agrees with that interpretation. Therefore, the court concludes that section 621(a)(2) grants to cable franchise operators a right of access through compatible easements.

2. *Plaintiff's Compliance with Section 621*

Assuming plaintiff has a right of access, the court still must answer a second question: has plaintiff constructed its present system through compatible easements on defendants' property? This question must be answered in the negative.

Plaintiff points to four easements that it believes satisfy section 621. First, plaintiff claims that its present system is properly constructed through its own easement. The problem with this contention is that plaintiff's easements on the Lakes and Woodsong Apartment properties have expired by their own terms. The Lakes agreement was expressly terminated on August 28, 1985, although it apparently expired automatically on February 20, 1985. The Woodsong contract also was expressly terminated on August 28, 1985, effective October 27, 1985. Additionally, plaintiff has failed to present any argument that the analysis contained in the court's December 27, 1985, order was incorrect as to the lack of a perpetual easement under Georgia law, Off. Code Ga. Ann. § 44-9-4. Thus, plaintiff's claim that it has a right of access through its own easement cannot be accepted.

Plaintiff next points to the easement granted to ODC as providing plaintiff a means of access. The agreements between ODC and McNeil Fund and between ODC and Woodsong provide as follow:

> 1.1. *Right of Use of Property*. ODC shall have the right and easement to use sufficient area of the Property solely for the location of the satellite receiving equipment and the local channel antenna tower (approximately 750 square feet), which location shall be subject to owner's prior approval, together with the right of access to such areas of the property as may be reasonably necessary to maintain and service the System.

This language does not grant ODC an easement as to the entire area of both properties, as plaintiff apparently contends. Rather, the portion of ODC's easement through which plaintiff may construct its system is limited to the area actually occupied by its equipment. Section 621(a)(2) grants a right of access through *compatible* easements. ODC's access-for-maintenance easement cannot be fairly characterized as a compatible easement. Plaintiff has failed to demonstrate that its system presently is constructed through ODC's easement for placement of its equipment.

The third set of easements through which plaintiff contends its system is presently constructed are easements granted to Georgia Power Company. Plaintiff has failed to convince the court that these easements "are unlimited in scope and time." *See* Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment, p.13. Therefore, plaintiff has failed to show that its system is constructed through Georgia Power's easements.

Finally, plaintiff argues that because both the telephone and electric companies have broad powers of eminent domain under Georgia law, *see* Off. Code Ga. Ann. §§ 22-3-20, 46-5-1, plaintiff's cable lines somehow follow these utilities' *potential* easements. This argument is without merit. If the electric or telephone company has already exercised its power of eminent domain to obtain an easement, then plaintiff may construct

through that easement. Plaintiff may not, however, construct through a utility company easement that does not yet exist. Thus, the utility eminent domain statutes do not change the fact that plaintiff's cable lines do not run through compatible easements.

Accordingly, plaintiff's motion to add Woodsong Associates, Ltd. as a defendant is GRANTED. The cross motions for summary judgment are GRANTED in part and DENIED in part. Plaintiff does have a right of access under the Cable Act. To the extent that plaintiff's system does not completely follow (i.e., does not "piggyback") rights-of-way or easements, plaintiff is not properly exercising its right of access. The court will allow plaintiff 90 days to remove those sections of its system on the Lakes and Woodsong Apartments properties that do not piggyback compatible easements.

SO ORDERED, this 10th day of OCTOBER, 1986.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 85-3712A
FILED APRIL 1, 1987

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

Plaintiff,

—vs.—

MCNEIL REAL ESTATE FUND VI., LTD., d/b/a THE LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORPORATION and WOODSONG ASSOCIATES, LTD.,

Defendants.

ORDER

This action is before the court on defendant's motion to dismiss count VIII of the complaint, plaintiff's motion to compel discovery related to count VIII, and on plaintiff's motion to enforce the court's order of October 10, 1986.[1] All of these motions are opposed.

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1 Defendants also have filed a motion to strike plaintiff's unauthorized brief concerning plaintiff's motion to enforce. The court will deny defendants' motion, although plaintiff is cautioned to comply with the local rules governing the filing of supplemental briefs. *See* LR 220-1(b)(2), N.D.Ga.

The background facts of this case were set out in the court's October 10, 1986, order granting in part and denying in part the parties' cross motions for summary judgment. The court held that plaintiff Cable Holdings of Georgia, Inc., d/b/a Smyrna Cable TV ("Cable Holdings") has a right of access to serve tenants in the Lakes and Woodsong Apartments. The court further held that, in exercising its access right, plaintiff's system must follow rights-of-way and compatible easements. To the extent plaintiff's system did not follow rights-of-way and easements, the court stated that it would allow plaintiff 90 days to remove the noncomplying sections of its system. Plaintiff now has filed a "Motion to Enforce the Court's Order Dated October 10, 1986" to enforce its access right. Also before the court is defendants' motion to dismiss and plaintiff's motion to compel.

1. *Motion to Enforce October 10 Order*

Plaintiff seeks an order "(1) enforcing Cable Holding's right of access found by this court in its order of October 10, 1986; and (2) enjoining the defendants from interfering with or preventing Cable Holdings from constructing any portion of or all of its cable television system located at [defendants' property along existing utility easements]". Plaintiff's motion to enforce, at 1. In essence, plaintiff asserts that defendants have prevented it from examining defendants' properties to determine which portions of plaintiff's system must be reconstructed to comply with plaintiff's right of access.

Defendants respond that they have no objections to plaintiff's inspection of their property-so plaintiff can determine which portions of its system must be removed. Defendants have not, however, given plaintiff permission to inspect the Lakes and Woodsong complexes to determine how to reconstruct its system pursuant to its right of access because the court's October 10 order contained no enforcement language concerning plaintiff's right of access.

The court agrees with defendants that the court's October 10 order did not delineate how plaintiff should proceed to exercise its access right. The court was not presented with, and thus did not decide, that question. The Cable Communications Policy

Act of 1984, 47 U.S.C. §§ 421-559, (the "Cable Act") provides no easy answers as to how access rights are to be enforced, and plaintiff's motion to enforce its right of access fails to outline how the court should proceed. Thus, the court will deny plaintiff's motion at this time. The court will direct the parties to submit briefs detailing how this action should proceed.

2. *Motion to Dismiss*

In an order dated November 21, 1986, the court deferred ruling on defendants' motion to dismiss plaintiff's Sherman Act claim (count VIII).[2] Plaintiff alleges that defendants have violated section 1 of the Sherman Act by conspiring to prevent plaintiff from providing cable television service to tenants residing at the Lakes and Woodsong Apartments. The court directed the parties to brief the issue of whether plaintiff's statutory right of access rendered moot plaintiff's Sherman Act claim. The parties' briefs have not been helpful, perhaps in part because the court did not define more precisely the issue to be briefed: Can plaintiff maintain a Sherman Act claim even though plaintiff has a Cable Act right of access that is not affected by an exclusive agreement that purports to prevent plaintiff from providing cable service to defendants' apartment tenants? The court must answer this question in the negative.

The essence of plaintiff's Sherman Act claim is that the exclusive cable service contract under which defendant ODC Communications Corporation ("ODC") provides cable service to tenants at the Lakes and Woodsong Apartments is an illegal restraint of trade because the contract prevents plaintiff from providing service to those tenants. The court finds that plaintiff fails to state a claim because ODC's exclusive contract cannot restrict plaintiff's right of access. *Cf.* H. R. Rep. No. 934, 93th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4696 ("Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in

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2 The court also did not rule on plaintiff's motion to compel discovery concerning plaintiff's Sherman Act claim. Obviously, if the court dismisses count VIII, then the motion to compel will be mooted.

violation of [the Cable Act] and not enforceable."). Thus, the court will grant defendants' motion to dismiss count VIII of the complaint and deny plaintiff's motion to compel discovery relating to count VIII.

Accordingly, plaintiff's motion to enforce the court's October 10, 1986 order is DENIED. Defendants' motion to strike plaintiff's supplemental brief is DENIED. Defendants' motion to dismiss count VIII is GRANTED. Plaintiff's motion to compel is DENIED. Plaintiff is DIRECTED to submit a brief within thirty (30) days of entry of this order adressing the issue of how this action should proceed. Specifically, plaintiff should address what action the court needs to take to enforce plaintiff's statutory right of access, including (1) what interior easements plaintiff may follow, (2) what type of reasonable access plaintiff should have to install and maintain its system, and (3) when and how just compensation should be determined. Defendants are DIRECTED to file a responsive brief, if they so desire, within twenty (20) days after plaintiff files its brief. The court will hold a hearing on these issues if it deems it necessary.

SO ORDERED, this 31st day of MARCH, 1987.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C85-3712A
FILED DECEMBER 23, 1987

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORPORATION

ORDER

On September 30, 1987, this court directed plaintiff to file a brief addressing whether plaintiff has an implied private right of action to enforce its access right found in section 621(a)(2) of the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 541(a)(2). On October 5, 1987, the Eleventh Circuit heard oral argument on that same issue in *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, No. 87-5463 (11th Cir.). *See* Plaintiff's brief filed October 9, 1987, at p. 1 n.*. Although the parties in this action previously informed the court of the pendancy of the *Centel* action, the court was not aware that oral argument should be held so soon.

In the interest of judicial economy, the court will stay this action pending a decision by the Eleventh Circuit in the *Centel*

case. If the Eleventh Circuit determines that cable operators have no implied private right of action to enforce section 621(a)(2) of the Cable Act, then this court probably will have to dismiss this lawsuit. On the other hand, if the Eleventh Circuit finds an implied private right of action, then this court will resume proceedings so it can enforce plaintiff's right of access. Another reason for staying these proceedings is that the private right of action issue presents a close question. If this court decided the issue before the Eleventh Circuit reaches its decision in *Centel*, the court believes it is likely that the party against whom this court ruled would seek a stay pending the Eleventh Circuit's decision.

Accordingly, all proceedings in this action are stayed pending the Eleventh Circuit's decision in *Centel*.

SO ORDERED, this 23 day of DECEMBER, 1987.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:85-cv-3712-RCF
FILED JUNE 30, 1988

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS and WOODSONG APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, and ODC COMMUNICATIONS CORPORATION

ORDER

On December 23, 1987, this court entered an order staying this action pending a ruling by the Eleventh Circuit Court of Appeals in the case of *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir. 1988). This court expected the Eleventh Circuit decision to address whether a franchised cable company has an implied private right of action to enforce its right of access found in section 621(a)(2) of the Cable Communications Policy Act of 1984 (the "Cable Act"), 47 U.S.C. § 541(a)(2). Because the Eleventh Circuit held in the above cited decision that there is an implied private right of action, this court must now determine what plaintiff in this action must do to enforce its access right.

Plaintiff asserted in its brief filed on May 18, 1988 that it could enforce its access right by following the easement granted to ODC Communications to operate a satellite master antenna television service at the Lakes and Woodsong Apartments. Defendants respond that ODC does not have an easement sufficient to allow plaintiff to construct its system in accord with the right of access granted under section 621.[1] Defendants also contend that plaintiff has not properly addressed how the issue of just compensation should be decided. The court agrees with defendants' contentions.

It is correct, as plaintiff asserts in its brief, that the Eleventh Circuit noted that just compensation need not be paid to the landowner to the extent that the cable franchisee's system is constructed through existing utility easements. *See Centel-Cable TV*, 835 F.2d at 1363 n.7. However, as defendants point out, the court did not decide what compensation might be due the holder of the utility easement if the utility is forced to allow use of that easement by the cable franchise. *See Federal Communications Commission v. Florida Power Corp.*, ____ U.S. ____, 107 S.Ct. 1107 (1987).

Additionally, plaintiff has not presented sufficient evidence to this court that there exist internal easements in the apartment buildings that plaintiff may follow in placing its system into the individual apartments. The court has given plaintiff several opportunities to demonstrate how its theoretical access right could be enforced, and, unfortunately, plaintiff has not been able to do so. The court acknowledges that the court may be partly to blame for the confusion surrounding exactly what plaintiff must show before the court can order defendants to allow plaintiff to construct its system on defendants' property. Moreover, in light of defendants' vigorous opposition on so many issues in this action and the difficult position that plaintiff finds itself in of having to explain to the court how it should fill in the gaps left by Congress in the Cable Act, it

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1 Defendants also contend that even if plaintiff could find exterior utility easements (i.e., outside the apartment buildings) through which it could construct its system, plaintiff has failed to establish the existence of utility easements inside the apartment buildings that would allow plaintiff access to place its lines inside the individual apartments.

should not be surprising that the litigation has continued for so long. However, the court—and probably the parties, too—wishes to conclude this litigation in the foreseeable future. Therefore, the court will hold a hearing in chambers so the parties can set forth to the court precisely what issues they believe remain to be resolved and how the court should proceed to resolve those issues.

Accordingly, the court DIRECTS counsel for the parties to appear for a hearing in chambers at 2121 United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia on Wednesday, August 10, 1988 and 10:00 a.m. to explain how the court should proceed in resolving this litigation. To ensure the effectiveness of this hearing, counsel for the parties are DIRECTED to meet with each other at least five (5) days prior to the hearing date to determine areas of agreement and disagreement as to what course the court should follow in resolving this litigation.

SO ORDERED, this 30 day of JUNE, 1988.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-3712
FILED SEPTEMBER 28, 1988

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV

Plaintiff,

—vs.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, ODC COMMUNICATIONS CORPORATION, and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS

Defendants.

CONSENT ORDER DISMISSING CLAIMS AND SETTING A BRIEFING SCHEDULE

This Court, having held a conference on August 26, 1988, pursuant to Order dated June 30, 1988.

IT IS ORDERED that:

1. Counts Third Through Eighth of plaintiff's Amended Complaint and the defendants' Counterclaims are dismissed with prejudice by voluntary agreement of the parties.

2. This Court having previously decided the First Count of plaintiff's Amended Complaint in its Order of October 10,

1986, the parties shall submit briefs on the single remaining Count, *i.e.*, Second Count, of Plaintiff's Amended Complaint in accordance with the schedule indicated below addressing the issue of whether any easements exist at either the Lakes or Woodsong properties pursuant to which plaintiff can construct a cable system in accordance with the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2):

a. Plaintiff's and Defendants' Cross Memorandum: November 23, 1988; and

b. Plaintiff's and Defendants' Cross Reply Memorandum: December 16, 1988.

3. While the plaintiff must prove that both exterior and interior easements exist at the subject properties, the plaintiff need not delineate at this time the precise location, width, length or depth of any such exterior or interior easements.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Consented to by:

/s/ PETER CANFIELD
Peter Canfield
DOW, LOHNES & ALBERTSON
One Ravinia Drive
Atlanta, Georgia 30346-2103
(404) 395-8874
ATTORNEYS FOR PLAINTIFF
Ga. Bar #107748

/s/ JOHN I. SPANGLER
John I. Spangler, III
ALSTON & BIRD
1200 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335
(404) 586-1500
ATTORNEYS FOR DEFENDANTS
Bar #669025

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 85-3712-RCF
FILED MARCH 31, 1989

CABLE HOLDINGS OF GEORGIA, INC.,
d/b/a SMYRNA CABLE TV

Plaintiff,

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS, THE ROBERT A. MCNEIL CORP., ODC COMMUNICATIONS CORP., and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS

Defendants-Appellants.

ORDER

This action is before the court on cross motions for summary judgment on Count Two of plaintiff's amended complaint.

The sole issue before the court at this time is whether adequate easements exist at the Lake Apartments and Woodsong Apartments [the properties] pursuant to which plaintiff can construct its cable system under the Cable Communication Policy Act of 1984 [Cable Act], 47 U.S.C. §§ 521-611. The access provision in the Cable Act provides in part:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way and through easements dedicated for compatible uses. . . .

47 U.S.C. § 621(a)(2). The statute specifically envisions that cable wires will be laid along existing utility easements.[1]

Defendants contend that adequate *interior* easements do not exist that would permit plaintiff to "piggyback" its wiring into the individual apartments located at the two apartment complexes in issue. Defendants concede that both the ODC Communications Corporation [ODC], a defendant in this action, and Georgia Power have exterior easements at the properties. Defendant submits that Southern Bell has no easements at all at the properties. Plaintiff contends that ODC, Georgia Power, and Southern Bell all have easements that plaintiff can follow to install its cable system.

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." The Supreme Court has clarified the standard for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554. The nonmovant, however, bears the burden of making a sufficient showing establishing the existence of each element essential to his case, and on which he will bear the burden of proof at trial. *Id.* at 322, 106 S. Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a

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1 Legislative history of the Cable Act indicates that "Congress intended to authorize the cable operator to 'piggyback' on easements 'dedicated for electric, gas, or other utility transmission.' " *Centel Cable Television v. Admiral's Cove Associates*, 835 F.2d 1359, 1362 n.5 (11th Cir. 1988), quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 59.

fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

The court is not satisfied that plaintiff has adequately addressed two narrow issues: 1) Can plaintiff reconstruct its cable system by piggybacking its lines along ODC's *existing lines*?[2] and 2) Is plaintiff prepared to remove its system when ODC's contractually-created easement expires?

The Court will allow plaintiff ten (10) days from the entry of this order to submit a memorandum not exceeding ten pages in length addressing these issues. A response is not required, but may be filed within ten (10) days of service of plaintiff's memorandum and shall not exceed ten pages in length. A reply brief will not be permitted.

Accordingly, the court will DEFER ruling on the parties' cross motions for summary judgment. The Clerk is DIRECTED to resubmit this action at the expiration of the above time period.

SO ORDERED, this 31 day of March, 1989.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

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2 The court would like plaintiff to address the issue of piggybacking onto ODC's existing lines, as opposed to reconstructing its system within the scope of ODC's written easement.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:85-cv-3712-RCF
FILED SEPTEMBER 23, 1989

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS, THE ROBERT A. MCNEIL CORP., ODC COMMUNICATIONS, CORP., and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS

ORDER

This action is before the court on cross motions for summary judgment on Count Two of plaintiff's amended complaint.[1] In the court's Order of March 31, 1989, the court deferred ruling on these motions and directed the parties to file supplemental briefs addressing two issues: 1) Whether plaintiff can reconstruct its cable system along *existing lines*; and 2) whether plaintiff is prepared to remove its cable system upon the expiration of the easement upon which plaintiff seeks to piggyback its system.

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1 All other claims have been dismissed. *See* Order of October 10, 1986; Order of September 28, 1988.

FACTUAL BACKGROUND

Plaintiff is a cable television company currently providing cable television services to the residents of defendants Lakes Apartments and Woodsong Apartments pursuant to a non-exclusive franchise agreement. Defendant McNeil Real Estate Fund IV, Ltd. [McNeil] owns the defendant Lake Apartments. Defendant Woodsong Associates, Ltd. owns the defendant Woodsong Apartments. Defendant Robert A. McNeil Corporation [McNeil Corporation] manages both the Lake and Woodsong Apartments.

Plaintiff originally provided its cable services pursuant to two separate contracts with defendants. Both contracts expired in 1985; thereafter, the defendant apartment owners entered into contracts with defendant ODC Communications Corporation [ODC] for ODC to provide cable services to the apartment residents.

PROCEDURAL BACKGROUND

The only remaining claim in this action is Count Two of the Amended Complaint in which plaintiff alleges that defendants have violated the Cable Communications Policy Act of 1984 [Cable Act], 47 U.S.C. §§ 521 et seq.[2] *See* Amended Complaint ¶¶ 40.42. Plaintiff seeks declaratory judgment that plaintiff has a right of access to the Lakes and Woodsong Apartments for the purpose of operating and maintaining its cable system under the Cable Act. Amended Complaint ¶ 74(2).

The access provision of the Cable Act provides in part:

> (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses. . . .

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2 All other claims have been dismissed. *See* Order of October 10, 1986; Order of September 28, 1988.

47 U.S.C. § 541(a)(2). The court has previously ruled that plaintiff has an implied private right of action to enforce the access provision of the Cable Act. *See* Order of June 30, 1988 (relying on the Eleventh Circuit's decision in *Centel Cable Television Co. v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir. 1988)). The court has also determined that the access provision of the Cable Act allows for cable operators to piggy back their lines onto *both* public and private easements, provided those easements are dedicated for compatible uses. *Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.*, 678 F. Supp. 871 (M.D. Ga. 1986).

On October 10, 1986, the court ruled that plaintiff may maintain its cable system on defendants' property, provided, however, that the system must "completely follow (i.e., . . . 'piggyback') rights-of-way or easements." *Id.* at 75. The parties now dispute whether adequate easements exist upon which plaintiff may piggyback its system. Additionally, defendants contend that the court has failed to adequately address the issue of just compensation for a taking of property.

SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The Supreme Court has clarified the standard for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554. The nonmovant, however, bears the burden of making a sufficient showing establishing the existence of each element essential to his case, and on which he will bear the burden of proof at trial. *Id.* at 322, 106 S. Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at

252, 106 S. Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury would return a verdict for the plaintiff on the evidence presented." *Id.*

In resolving the issues before the court, the court finds that plaintiff's rights under the Cable Act are neither as great as plaintiff contends nor as limited as defendants argue. As a matter of law, under the Cable Act, plaintiff may piggyback its cable system along ODC's system.[3] Although defendants contend ODC does not have any interior easements, the court disagrees. The contracts granting ODC the exclusive right to install and operate cable systems at the two apartment complexes provide:

> 1.1 *Exclusive Rights.* Subject to the requirements of all laws, ordinances, rules and regulations of any federal, state, county, local, and other governmental agency or authority having jurisdiction over the use of the Property, the installation of the System, or the programming transmitted by the System, Owner hereby grants ODC the exclusive right and privilege to install a private cable system on the property and to operate and maintain the same and provide satellite pay television programming to residents of the Property.
>
> . . . .
>
> 1.2 *Right of Use of Property.* ODC shall have the right and easement to use sufficient area of the Property solely for the location of the satellite receiving equipment and the local channel antenna tower (approximately 750 square feet), which location shall be subject to Owner's prior approval, together with the right of access to such areas of the Property as may be reasonably necessary to maintain and service the System.
>
> . . . .

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3 Plaintiff also contends it can piggyback easements granted to the telephone company and easements granted to the electric company. As discussed in the court's order of October 10, 1986, plaintiff may only piggyback its system onto utility easements that are actually occupied with the utilities' equipment. *See Cable Holdings*, 678 F. Supp. at 874-75.

> 2.1 *Installation.* ODC, at its expense, shall install, maintain and operate the System on the Property in a first-class manner. ODC's plans and specifications for installation of the System shall be subject to Owner's prior approval.
>
> . . . .
>
> 3.1 *Access of ODC.* Owner shall provide ODC, at no cost to ODC, with such access, use and occupancy granted in this Agreement as is reasonably necessary for ODC to install, operate, and maintain the System and provide the services in the manner contemplated by this Agreement. . . .

Private Cable Television System Agreements [ODC Agreements], attached as exhibits A, B to Defendants' Statement of Material Facts, filed June 27, 1986.

Defendants claim that ODC has a limited exterior easement of 750 square feet and no interior easements. Defendants argue that ODC's right of access to the interior of the defendant apartment buildings is merely a revocable license. Defendants point to the language of the ODC Agreements which use the word "easement" only in the paragraph granting ODC the right to utilize 750 square feet of exterior property for the erection of the satellite receiving equipment and tower. With respect to ODC's rights of "access, use and occupancy . . . to install, operate, and maintain the System," the word "easement" is not used. Plaintiff contends that the rights conveyed in paragraph 3.1 of the ODC Agreements is in fact an easement and to decide otherwise would be to "exalt form over substance and subvert the purposes of the Cable Act to foster competition and maintain a diversity of cable information sources." Plaintiff's Memorandum of Law, filed December 23, 1988, at 7-8.

The court finds that ODC does have both exterior and interior easements at the defendant apartment complexes. Under Georgia law, an "easement is the 'right in the owner of one parcel of land . . . to use the land of another in the owner.' " *Brown v. Tomlinson*, 246 Ga. 513, 514, 272 S.E.2d 258, 259 (1980) (quoting Black's Law Dictionary). A license is the permission or authority to do a particular act or series of acts on

the land of another. *Berolzheimer v. Taylor*, 230 Ga. 595, 198 S.E.2d 301 (1973).

A license to act upon someone's land, however, may become an easement if the licensee incurs expenses such that revocation will harm the licensee. *Mayor and Council of Athena v. Gregory*, 231 Ga. 710, 203 S.E.2d 507 (1974). In *Bell Industries, Inc. v. Jones*, 220 Ga. 684, 141 S.E.2d 533 (1965), the Supreme Court of Georgia ruled that where a licensee expended money to lay a pipe over petitioner's land in order to dispose of waste onto petitioner's land, pursuant to a license, petitioner could not revoke the license because the license had become an easement running with the land.

In this case, the ODC Agreements create *both* external and internal easements at the Lakes and Woodsong properties. ODC is not merely performing an act on the properties. ODC installed its equipment on the properties and is now occupying and using the properties. It is curious that the parties to the ODC Agreements attempt to characterize the external use as an easement and the internal use as a license. The court finds no difference in the character of ODC's use of the exterior property and ODC's use of the interior property. Moreover, the duration of ODC's rights to use the exterior property and interior property is the same.

The court clearly rejects defendants' contention that ODC's right to lay its cables inside the defendant apartments is merely a license. Even if the parties to the ODC Agreements intended to create a license, at this point ODC has incurred the expense of laying all the cable and thus under Georgia law an easement has arisen.

Defendants persist in challenging plaintiff's legal right to piggy back its cable system onto existing *private* easements. That issue has already been resolved in plaintiff's favor. The court has determined, as a matter of law, that plaintiff may install its cable "in the area actually occupied by [ODC's] equipment." *Cable Holdings*, 678 F. Supp. at 875. Likewise, plaintiff may piggyback its cable along easements that are actually occupied by telephone and electrical lines. Plaintiff contends those limited easements are adequate for it to install its system and defendants have failed to come forward with any

evidence indicating they are not. Accordingly, summary judgment is appropriate on this issue.

The one issue that remains for determination is the issue of just compensation. The court agreed in its order of October 10, 1986 that "the language of section 621(a)(2) and the legislative history of the Cable Act indicate that Congress intended compensation to be paid for any taking." *Id.* The Eleventh Circuit has indicated in dicta that when a property owner voluntarily grants an easement to utilities, a cable operator may use that easement without offending the taking clause of the Constitution. *Centel Cable Television Co.*, 835 F.2d at 1363 n.7. It would be consistent with the Eleventh Circuit's position to rule that allowing cable companies to utilize public easements does not require just compensation.

Just compensation appears to be appropriate in this action, however, because ODC's easement is a private easement. The court will not enter final judgment in this action until the issue of just compensation has been addressed and resolved. The parties are DIRECTED to confer within twenty (20) days of the entry of this order and discuss possible terms for compensation. Within ten (10) days of conferring the parties shall file memoranda discussing possible resolutions of the compensation issue.

Accordingly, plaintiff's motion for summary judgment is GRANTED in part and DENIED in part. Defendants' motion for summary judgment is GRANTED in part and DENIED in part. The Clerk is DIRECTED to resubmit this action at the expiration of the above time period.

SO ORDERED, this 23 day of September, 1989.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:85-CV-3712-RCF
FILED MARCH 27, 1990

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS, THE ROBERT A. MCNEIL CORP., ODC COMMUNICATIONS CORP., and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS

ORDER

The only issue remaining in this action is the determination of just compensation.[1] The court believes an additional period of discovery is necessary for the parties to address the just compensation issue. As defendants note, apparently this is the first time this issue has been addressed in the context of section 541(a)(2) of the Cable Act.

Accordingly, the parties may conduct discovery on the issue of just compensation from the entry of this order until July 20,

1 In the court's order of September 28, 1989, the court determined that plaintiff does have a right of access to the defendant apartment complexes for the purpose of operating and maintaining a cable system. The court held that plaintiff must pay just compensation to the holder of the private easements upon which plaintiff intends to "piggyback" its system.

1990. On or before August 20, 1990, defendants shall file a brief addressing the issue of what property is being taken, who is entitled to compensation, and how that compensation should be determined. On or before September 20, 1990, plaintiff shall respond. The court anticipates that a conference will be scheduled shortly thereafter to decide how best to resolve this matter.[2]

SO ORDERED, this 27 day of March, 1990.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

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2 The court is aware that one of defendants' lawyers will be unavailable for a one-month period beginning September 15, 1990. She should file a petition for a leave of absence pursuant to LR 110-5(b), NDGa.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action. 1:85-CV-3712-RCF
FILED NOVEMBER 27, 1990

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV

—VS.—

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a THE LAKES APARTMENTS, THE ROBERT A. MCNEIL CORP., ODC COMMUNICATIONS CORP., and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS

ORDER

This action is before the court on plaintiff's motion for summary judgment and defendants' motion for partial summary judgment. The only issue remaining in this action is whether defendants are entitled to just compensation.

BACKGROUND

Plaintiff is a cable television company that provided cable television services to the residents of defendants Lake Apartments and Woodsong Apartments pursuant to a non-exclusive franchise agreement. Defendant McNeil Real Estate Fund IV, Ltd. [McNeil] owns the defendant Lake Apartments. Defendant Woodsong Associates, Ltd. owns the defendant

Woodsong Apartments. Defendant Robert A. McNeil Corporation [McNeil Corporation] manages both the Lake and Woodsong Apartments.

Plaintiff originally provided its cable services pursuant to two separate contracts with defendants. Both contracts expired in 1985; thereafter, the defendant apartment owners entered into contracts with defendant ODC Communications Corporation [ODC] for ODC to provide cable services to the apartment residents. Plaintiff then alleged that defendants violated the Cable Communications Policy Act of 1984 [Cable Act], 47 U.S.C. §§ 521 *et seq*.

The access provision in section 621(a) of the Cable Act provides in part:

> (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses. . . .

47 U.S.C. § 541(a)(2). This court has previously ruled that plaintiff has an implied private right of action to enforce the access provision of the Cable Act. *See* Order of June 30, 1988 (relying on the Eleventh Circuit's decision in *Centel Cable Television Co. v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359 (11th Cir. 1988)). This court has also determined that the access provision of the Cable Act allows for cable operators to "piggyback" their lines onto *both* public and private easements, provided those easements are for compatible uses. *Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.*, 678 F. Supp. 871 (N.D. Ga. 1986). On October 10, 1986, the court ruled that plaintiff may maintain its cable system on defendants' property, provided, however, that the system must "completely follow (*i.e.*, . . . 'piggyback') rights-of-way or easements." *Id.* at 875. In September of 1989, the court ruled that as a matter of law, it was clear that plaintiff could adequately install its system on defendants' properties along the existing limited easements for compatible uses. *See* Order of

September 28, 1989. Thus, the only issue that remains for determination is the question of just compensation.

SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56 the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The Supreme Court has clarified the standard for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554. The nonmovant, however, bears the burden of sufficiently establishing the existence of each element essential to his case on which he will bear the burden of proof at trial. *Id.* at 322, 106 S. Ct. at 2553. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512. The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

Plaintiff seeks a ruling that plaintiff's use of both the public and private easements on defendants' properties will not constitute an unconstitutional taking of property, and that none of the defendants are entitled to just compensation. In contrast, defendants move for partial summary judgment on the issue that the taking of ODC's private property requires payment of just compensation. Defendants also ask the court to rule that proof of just compensation shall include consideration of the value of the right of exclusivity in ODC's private easements, and that expert testimony on the issue is relevant and admissible at trial.

In an earlier decision in this action, the court expressed agreement with another district court's decision that "the lan-

guage of section 621(a)(2) and the legislative history of the Cable Act indicate that Congress intended compensation to be paid for any taking." *Cable Holdings*, 678 F.Supp. at 874 (cit. omitted). It is clear that this dicta was rejected as to public easements by the Eleventh Circuit in the following statement in *Admiral's Cove*:

> Admiral's Cove assumes that Congress could not authorize a cable franchise to use utility easements because such an authorization would be an unconstitutional taking under *Loretto*. . . . since most developers voluntarily grant easements for use by utilities, however, Congress may force the developer to allow a cable franchise to use the easement without offending the taking[s] c[l]ause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.

Admiral's Cove, 835 F.2d at 1363 n.7 (citations omitted). The court therefore concluded in its September 1989 order that "[i]t would be consistent with the Eleventh Circuit's position to rule that allowing cable companies to utilize public easements does not require just compensation. Just compensation appears to be appropriate in this action, however, because ODC's easement is a private easement." Order of September 28, 1989.

A recent Eleventh Circuit opinion indicates, however, that just compensation for plaintiff's use of ODC's private easement in this action is also not appropriate. In *Centel Cable v. White Development Co.*, 902 F.2d 905, 907 (11th Cir. 1990), a developer dedicated public utility easements to power and telephone companies, and also "dedicated a 'utility easement' to St. Lucie West Utilities, Inc. for the purpose of installing video communications." The developer's plat further "provided that all roads within [the development] would be private rights-of-way and dedicated the easements to the defendant." *Id.* The developer then refused to allow Centel, a franchised cable company,

to use the private easements to reach the compatible utility easements in the development. The Eleventh Circuit upheld the district court's finding that the franchised cable company had a right of access to the development's utility easements under the Cable Act and held that the "[developer]'s allowing FP & L and Southern Bell access to [the development]'s private roads while prohibiting Centel access to those roads is a private agreement in violation of the Cable Act." *Id.* at 909.

The developer in *White* also argued that "under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982), Congress's providing cable companies with a right of action to install cables in White's 'private' easement is a *per se* violation of the Takings Clause." *Id.* In response to this argument, the Eleventh Circuit relied upon the footnote in *Admiral's Cove* that indicates Congress may force the use of an easement without violating the takings clause. The Eleventh Circuit then stated that "[a]ccordingly, White's Takings Clause argument [as applied to private easements] must be rejected under *Admiral's Cove*" *Id.* at 910. Defendants attempt to distinguish *White*'s holding by arguing that no just compensation was necessary because the private easement in *White* was a "transitory, limited easement of mere passage." Defendants' Reply, at 3. The court finds no limiting language in the Eleventh Circuit's clear holding, however, and must rule that under *White*, no just compensation is necessary for the taking of a private easement that violates the Cable Act.

Accordingly, plaintiff's motion for summary judgment is GRANTED. Defendants' motion for partial summary judgment is DENIED. The clerk is DIRECTED to enter final judgment in this action in favor of plaintiff.

SO ORDERED, this 27 day of November, 1990.

/S/ RICHARD C. FREEMAN
Richard C. Freeman
UNITED STATES DISTRICT JUDGE

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1-85-CV-3712-RCF

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV,

Plaintiff(s)

—V.—

MCNEIL REAL ESTATE FUND VI, LTD. et al

Defendant(s)

JUDGMENT

This action came on for consideration before the Court, Honorable Richard C. Freeman, District Judge, presiding, and the issues having been considered and a decision having been rendered.

It is Ordered and Adjudged that plaintiff's motion for summary judgment is GRANTED.

Dated at Atlanta, Georgia, this 29 day of November, 1990.

LUTHER D. THOMAS, CLERK

/s/ EVELYN BROWN
by Evelyn Brown
Deputy Clerk

FILED IN CLERK'S OFFICE
November 27, 1990
AND ENTERED ON DOCKET
November 29, 1990
NORTHERN DISTRICT OF GEORGIA
LUTHER D. THOMAS, CLERK

BY: /s/ EVELYN BROWN
Evelyn Brown
Deputy Clerk

APPENDIX O

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8032

FILED APRIL 9, 1992

CABLE HOLDINGS OF GEORGIA, INC.,

Plaintiff-Appellee,

—versus—

MCNEIL REAL ESTATE FUND VI, LTD., Woodsong Apartments dba Lakes Apartments, ROBERT A. MCNEIL CORPORATION, ODC COMMUNICATIONS CORPORATION, WOODSONG ASSOCIATES, LTD.,

Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, TUTTLE, Senior Circuit Judge, and FULLAM*, Senior District Judge.

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* Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

PER CURIAM:

(X) The petition(s) for Rehearing are DENIED and no member of this panel or other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 15-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ [ILLEGIBLE] BIRCH
UNITED STATES CIRCUIT JUDGE

APPENDIX P

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

APPENDIX Q

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153(v) of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(June 19, 1934, c. 652, Title VI, § 621, as added Oct. 30, 1984, Pub.L. 98-549, § 2, 98 Stat. 2786.)

APPENDIX R

CONSUMER ACCESS TO CABLE SERVICE

Sec. 633. (a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner (including a person who owns shares which entitle such person to occupy a unit in a cooperative project) of a unit in such building or park.

(b)(1) A State or franchising authority may, and the Commission shall, prescribe regulations which provide—

(A) that the safety, functioning, and appearance of the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both;

(C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator; and

(D) methods for determining just compensation under this section.

(2) A State or franchising authority may make the regulations prescribed by the Commission applicable within such entity's jurisdiction.

(c) Any owner of such a multiple-unit building or park may not demand or accept payment from any cable operator in exchange for permitting construction or installation of facilities necessary for a cable system on or within the permises in excess of any amount which constitutes just compensation.

(d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to—

(1) the extent to which the cable system facilities physically occupy the premises;

(2) the actual long-term damage which the cable system facilities may cause to the premises;

(3) the extent to which the cable system facilities would intefere with the normal use and enjoyment of the premises; and

(4) the enhancement in value of the premises resulting from the availability of services provided over the cable system.

(e)(1) During any period for which regulations by a State or franchising authority are not otherwise in effect under subsection (b), regulations of the Commission shall apply with respect to the cable system involved.

(2) Regulations under subsection (b) shall be prescribed not later than 180 days after the effective date of this title.

(f) This section shall take effect on the 180th day after the effective date of this title.

(g) The preceding provisions of this section shall not apply to units which are customarily leased to a person for a period of less than 30 days and to units in a hospital.

(h)(1) This section shall not apply to any owner of a multiple unit residential or commercial building or manufactured home park who makes available to residents a diversity of information sources and services equivalent to those offered by the cable system authorized to provide cable service in the area in which such building or park is located, as determined under rules prescribed by the Commission.

(2) The Commission shall prescribe rules to carry out the provisions of paragraph (1) not later than 180 days after the effective date of this title.

APPENDIX S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Civil Action, File No. 88-14148-CIV-ROETTGER
FILED FEBRUARY 28, 1989

CENTEL CABLE TELEVISION COMPANY OF FLORIDA,
Plaintiff,

—VS.—

THOS. J. WHITE DEVELOPMENT CORPORATION, ST. LUCIE WEST COUNTRY CLUB ESTATES ASSOCIATION, INC. and ST. LUCIE WEST UTILITIES, INC.,
Defendants.

FINAL ORDER

This Cause came to be heard for an evidentiary hearing on November 14, 1988 and November 16, 1988 on plaintiff's Centel Cable Television Company of Florida ("Centel"), Emergency Motion for a Preliminary Injunction, pursuant to Rule 65, Federal Rules of Civil Procedure, consolidated by stipulation of the parties upon Centel's request for Declaratory Judgment and Permanent Injunctive Relief.

Plaintiff seeks to permanently enjoin the defendants from denying it access to public rights-of-way, easements dedicated to uses compatible with the construction of a cable system and private rights-of-way for gaining access to and from the easements at defendants' new planned community development, St. Lucie West.

This action arises under the Federal Cable Communications Policy Act of 1984, 47 U.S.C. § 541 (1985) (Cable Act); the Florida Plat Act, § 177.091(29) Florida Statutes (1987) ("Plat Act") and Florida common law. Plaintiff seeks a declaration on its rights under the Cable Act and the Plat Act.

This Court has jurisdiction under 28 U.S.C. § 1331 over the federal claim. In addition, this Court has pendent jurisdiction over the state law claims which share with the federal claim a common nucleus of operative facts, *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). A case of actual controversy exists over plaintiff's legal right to enter St. Lucie West as a result of the defendants' refusal to permit plaintiff access to the utility easements located at St. Lucie West for the purpose of constructing, installing, maintaining and operating its cable television system. This Court has the discretion to declare rights arising under the Cable Act and Plat Act pursuant to 28 U.S.C. § 2201 and 2202.

The issues raised have been briefed and this Court has reviewed evidence, heard testimony of witnesses and argument of counsel. This Court concludes that the plaintiff is entitled to permanent injunctive relief, and hereby makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, Centel Cable Television Company of Florida ("Centel"), is a Florida corporation, with its principal place of business in Riveria Beach, Florida. Centel is engaged in the distribution of "cable service". Cable service, as used herein, means (a) the one-way transmission to subscribers of video programming or other programming service, and (b) subscriber interaction, if any, which is required for the selection of such video programming or programming service. Centel owns and operates cable systems in St. Lucie County, Florida, where the instant action arises.

2. Centel is a licensed franchised cable television operator and has non-exclusive franchises from St. Lucie County and the City of Port St. Lucie, where the defendants' community

development known as St. Lucie West is located. Currently, Centel has approximately 14,000 subscribers in Port St. Lucie and another 10,000 in St. Lucie County.

3. Defendant, Thos. J. White Development Corporation ("White") is a Florida corporation which maintains its principal place of business at Port St. Lucie, Florida. Through its duly authorized officers and agents, White is engaged in the development of real estate and White owns the 4600 acres comprising St. Lucie West.

4. St. Lucie West is a mixed use development capable of accommodating 18,000 residential units. White expects to contract with builders who will construct between 12,000 and 14,000 or more housing units in an area encompassing twenty square miles. In addition, the community has planned accommodations for the Indian River Community College, Barry University, the New York Mets stadium complex (which has been constructed), six public school sites, hospital and medical facilities, industrial and commercial sites, hotel and convention sites and a shopping mall.

5. White recorded the plat ("Plat") of St. Lucie West on or about January 20, 1988. Plaintiff's Exhibit "2". The Plat itself, entitled "Plat 2 Country Club Estates, Parcel 8—Phase 1" was signed and the dedications contained therein were made on or about December 18, 1987.

6. At this stage in time, only 40 to 50 residential units are under construction or have been constructed in the Country Club Estates ("Estates"). The Estates' current number of housing units is but a fraction of the projected number which will eventually exist there. Six residential units are now occupied by individuals.

7. Defendant, St. Lucie West Country Club Estates Association, Inc. ("Association"), is a Florida non-profit corporation, which maintains its principal place of business at Port St. Lucie, Florida. Through its duly authorized officers and agents, the Association is engaged in representing and acting

for its members who are residential unit owners of property in St. Lucie West.

8. Defendant St. Lucie West Utilities, Inc. (SLW Utilities) is a Florida corporation which maintains its principal place of business at Port. St. Lucie, Florida. SLW Utilities is controlled by White. There are common officers and/or directors and to some degree shareholders. White's president is also president of the Association and SLW Utilities, which is in the business of constructing, maintaining and providing sewer, water and irrigation services to St. Lucie West.

9. Considering cable television to be another utility, White decided in 1986 to go into the cable business because it was profitable and would serve various needs for special community services. White desired and intended to become the sole provider of cable television services at St. Lucie West. To insure profitability, White wanted the business to involve the formation of a 50-50 joint venture with a company knowledgeable in cable communications. White did not intend to contribute capital to the venture but wanted equity and a share of the profits.

10. In the fall of 1986, Centel and White participated in an introductory meeting in which they discussed their respective philosophies on cable service and St. Lucie West. White's position was that it could keep Centel out of the development, control access to the development, control who built cable in the development and choose the cable company which would exclusively service St. Lucie West. White believed that it could control access because it owned the land and that Centel's franchise with the City of Port. St. Lucie did not govern in the development. White wanted the provision of cable television and in addition, a two-way monitoring system for meter reading, counting in and out-going traffic, waste management and traffic lights.

11. Centel was the franchise holder and wanted to provide service to St. Lucie West. Although it was not interested in a joint venture, Centel wanted to know what had to be done to be chosen by White to provide service. Centel was prepared to

provide service with no capital contribution from White and voiced its belief that its franchise permitted servicing the development which was a part of Port St. Lucie and the Cable Act allowed access to the development. At the time, the Plat Act had not been amended to include the provision regarding cable television service and the law was in its infancy on the issue of access under the Cable Act. Centel wanted to work amicably with White and did not want to debate the law.

12. After several other meetings, Centel submitted a proposal outline for servicing the development, on March 10, 1987. The proposal for exclusive service was based upon the assumption that White's position on access control was correct and Centel included the specifications requested by White. The proposed payments for the exclusive right was made contingent upon White's demonstration that its position was legally correct and access could be controlled. Centel wanted White to show that Centel could be denied access and that its franchise did not permit access. Centel would have accepted an exclusive contract if its position proved to be incorrect. If White's position was incorrect, Centel could still provide service in the development. Exclusivity was not of primary importance to Centel, although more economically desirable. Centel wanted assurances that White would defend the rights it granted and security in the event that White did not develop the community after Centel expended funds to install its cable system. White did not seriously consider this proposal since it did not provide equity participation and never responded to Centel's proposal or informed Centel that the proposal was rejected or the reasons for same.

13. In or about early 1987, a separate entity, St. Lucie West Cablevision, Inc. (SLW Cablevision) was created for the purpose of providing cable television services to St. Lucie West. White, through its duly authorized officers and agents, controls SLW Cablevision. There are common directors and at least to a degree, common stockholders in White and SLW Cablevision whose president is White's president. On August 3, 1987, SLW Cablevision was awarded a non-exclusive franchise from the

City of Port St. Lucie to service St. Lucie West. Centel also holds a non-exclusive franchise to service the development. St. Lucie West has been annexed by the City of Port St. Lucie and both Centel and SLW Cablevision can do business in St. Lucie West.

14. On December 1, 1987, SLW Cablevision entered into a joint venture partnership agreement with MERC Communications of Michigan, ("Mercom"), a Michigan corporation, to provide exclusive cable television service to St. Lucie West. The officers of SLW Cablevision are partners in the venture. On January 1, 1988, Mercom entered into a substitution agreement and transferred its interest by assignment to Mercom of Florida, Inc. On April 26, 1988, the Port St. Lucie City Council approved the assignment of the non-exclusive franchise held by SLW Cablevision to St. Lucie West Cablevision, Co. (SLW Cablevision Co.), the joint venture between SLW Cablevision and Mercom.

15. Defendant, White dedicated utility easements on Plat 2 to Florida Power and Light ("FP&L") and Southern Bell for the purpose of installation and maintenance of their utilities only, but not for video communications. The easements, dedicated to FP&L and Southern Bell are public not private easements, however, designated by White on the plat.

16. A "utility easement" is dedicated to St. Lucie West Utilities, Inc., for the purpose of installation and maintenance of utilities and video communications and co-exists with all private road rights-of-way.

17. White dedicated the rights-of-way of all streets, roads and/or drives to the Association for the purpose of providing access, utility installation and/or drainage. White designated the rights-of-way as "private road rights-of-way".

18. To ensure that White's cable company would be the only one to provide service to St. Lucie West, White planned its system, plats and contracts to provide for the control of access. A portion of this plan was to control the use of easements. White's contractual obligations with the joint-venture included

doing everything possible to protect the venture's sole right to provide cable service. The easements in Plat 2 were drafted to provide access control. When the easements were drafted, nothing was done by White to insure that the easements as drafted were in compliance with the Cable Act or the Plat Act which was effective on October 1, 1987.

19. There are a number of express dedicated easements and rights-of-way (both public and private) that are available for Centel to utilize in order to access any compatible utility easements for construction of its cable system. It is clear from the four corners of the Plat that White intended those "rights-of-way", however designated, to be used for access to the utility easements, more specifically, the "easements" dedicated for various utility and cable communications purposes. Since these dedications are express rights-of-way for the utilities and there are other private or recorded agreements with FP&L and Southern Bell to allow access to their easements, any such useage is an integral part of the dedicated easements so that every easement holder can fully enjoy the beneficial use of its respective platted easements.

20. Defendants have permitted FP&L and Southern Bell to use the "private" roadway system of St. Lucie West, which was obviously intended for normal usage by vehicular traffic, for the purpose of gaining access to and from their respective utility easements. FP&L and Southern Bell have begun installation of their respective utility facilities.

21. This Court finds that defendants are estopped from denying Centel the same rights of usage of the roadways, however designated, which defendants have accorded to FP&L and Southern Bell for the purpose of gaining access to and from their respective easements. Centel shall be permitted to utilize defendants' private roadways for the purpose of gaining access to and from the utility easements in order to facilitate the laying of its cable system and to repair, maintain and operate those facilities.

22. This Court does not find that White or the other defendants deliberately acted in defiance of either the Cable Act or

the Plat Act because they were unaware of the existence of these acts at the time they recorded the plat. Rather, their actions were intended to benefit themselves economically. Their actions were designed as a result of their desire to allocate cable rights entirely to themselves in order to fully profit from cable subscription fees in the development. By keeping Centel and any other cable company out of the development and by ensuring entry only to SLW Cablevision Co., defendants' profits would have been guaranteed because there would be no competition in the development from other cable companies.

23. Centel has attempted to make immediate use of the public rights of way, the express utility easements to construct a cable television system within St. Lucie West, and the private road rights-of-way described within the Plat for the purpose of gaining access to and from the easements. Centel began construction of its system in late July, 1988. SLW Cablevision had not yet begun its construction.

On August 2, 1988 and August 3, 1988, Centel attempted to install its cable by following the FP&L and Southern Bell easements at St. Lucie West. The defendants threatened to impound the truck of Centel's construction supervisor and told Centel to leave St. Lucie West. Centel ceased laying its cables and left the development. The defendants have since denied Centel any further access to St. Lucie West but have permitted SLW Cablevision Co. to lay its cables.

24. Centel desired early access to the easements at St. Lucie West to install its cable system at a time when FP&L and Southern Bell were installing their respective electrical and telephone facilities in the easements. This Court finds that when a development is in its preconstruction stages, it is commercially feasible for a cable company to immediately follow behind a utility and lay its cable before the property is developed to the point that there are driveways, buildings, lawns, landscaping and other additions which may impede, inhibit or prevent the installation of underground cable. Ascertaining the locations of other utility lines or systems is also crucial for a cable operator in order to facilitate the proper laying of cable

within an easement and to prevent disruption or destruction of portions of those other systems when the cable is installed. A cable operator which is denied early access to a development faces the substantial costs of trenching through yards under completed driveways and sidewalks and the expenses of restoring the property and its landscaping to its original condition, if it has access only after the property is developed. A residential owner would be severely inconvenienced by a late entering cable company. In addition, other utilities which must locate their systems for the cable operator prior to installation of the cable would be inconvenienced. There is little risk of damage and disruption to a homeowner's property if a cable operator has early access to the development and can wire individual residences prior to occupancy.

25. This Court finds that Centel clearly erred by laying its cable outside of the easement, which it admits and by going around a pole and laying the cable one or two feet on private property. The property in issue is unsodded or unseeded and it would take Centel a matter of one hour to correct the error. In mitigation for the error, this Court also finds that it was caused in whole or in part by defendants because they refused to cooperate in providing locates on the site to indicate to Centel where the water and sewer lines were located prior to the installation of Centel's cable. Defendants have stated that they will locate the utility lines only if this Court orders them to do so. This Court orders the defendants to locate their utility and cable lines or systems for Centel and incorporates this Order into the Order for Permanent Injunction. Further, this Court finds that the defendants were not damaged by this accidental and minor inconvenience and are not entitled to damages for the trespass because the defendants' conduct contributed to it.

26. On September 12, 1988, the parties stipulated and agreed that defendants would not continue to construct any cable system or lay any cable lines for the purpose of constructing a cable television or communication system at St. Lucie West until this Court held a full evidentiary hearing on Centel's motion. Centel and defendants agreed not to activate,

operate or market their respective cable systems in St. Lucie West until this Court ruled on Centel's request for injunctive relief. If Centel prevailed on the merits and this Court entered an order, it was agreed that for a period of 30 days, both parties would only be permitted to construct their systems until completed. After the 30 days expired, both parties would then be permitted to market their systems and solicit customers. On November 11, 1988, this Court entered its Order on the Stipulation, *nunc pro tunc* to September 12, 1988.

CONCLUSIONS OF LAW

SECTION 541 OF THE FEDERAL CABLE COMMUNICATIONS POLICY ACT PROVIDES A CLEAR STATUTORY RIGHT OF ACCESS TO ALL EASEMENTS DEDICATED FOR COMPATIBLE USES.

1. Section 621(a) (2) of the Cable Act, 47 U.S.C. § 541(a) (2) is a mandatory access statute providing franchised cable operators access to all easements dedicated to compatible uses. *Centel Cable Television Company of Florida v. Admiral's Cove Associates*, 835 F.2d 1359, 1362 (11th Cir. 1988). ("To help encourage the growth of cable systems, Section 621(a) authorizes all cable franchises to lay their wires along utility easements. This authorization provides a right of access for all franchise operators."); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund IV, Ltd.*, 678 F.Supp. 871, 873 (N.D. Ga. 1986) ("Section 621(a) grants the cable franchise operators a right of access through compatible easements"); *Rollins v. Cablevue, Inc. v. Saienni Enterprises*, 633 F.Supp 1315, 1322 (D. Del. 1986) (quoting the language of § 541, it was the court's opinion that the plaintiff would prevail "on the right of access question . . ."); *Greater Worchester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, CA 85-2022 MA. (D. Mass. 1985), (In holding the plaintiff's right to make full use of the easements of the apartment complex, the court determined that Section 621(a)(2) gave the plaintiff "the right to use easements or public rights-of-way dedicated for electric, gas, telephone, or other such utility transmission."), opinion at 32; *Centel*

Cable Television Company of Florida v. Burg & Divosta Corp., Case No. 88-8378-CIV-RYSCAMP (S.D. Fla. 1988) ("Section 621 of the Cable Act . . . grants franchised cable operators the right to construct cable systems over public rights-of-way and easements which have been dedicated for compatible uses. Centel has a clear statutory right of access pursuant to this section . . ."), opinion at 5.

2. A franchised cable operator such as Centel has a private right of action under the Cable Act to enjoin violations of the Act when access to easements dedicated to compatible uses has been denied. *Centel Cable Television Company of Florida v. Admirals Cove Associates, Ltd., supra.* Centel has been denied access to the community development known as St. Lucie West, by defendants in contravention of the Cable Act and specifically Section 621, 47 U.S.C. § 541 (Supp. 1985) which provides a clear statutory right of access. Defendants' argument that a right of action under the Cable Act does not necessarily create a substantive right of access to easements dedicated to compatible uses is without merit.

3. Plaintiff contends that since § 541(a)(2) is a mandatory access statute, any dedicated easements or rights-of-way for access to and from the utility easements compatible to cable usage are available for ingress and egress. Plaintiff argues that any denial by defendants of the means to gain access to and from the utility easements is the equivalent of denying access to use those easements in violation of the Cable Act.

Defendants argue that Congress only authorized use of public easements for installation of a cable system, but not easements dedicated to the utilities for use. Defendants submit that Section 541 is unconstitutional because it permits a "taking of property" without just compensation when a cable system is installed in an easement or is allowed to cross private property to get to and from that easement. This Court finds that the law is clear and overwhelmingly in support of plaintiff's position and that defendants' arguments must be rejected.

4. The legislative history of the Cable Act establishes that any private arrangements seeking to restrict a cable system's

use of easements dedicated to compatible uses or rights-of-way which have been granted to other utilities are specifically prohibited. "Such arrangements violate 47 U.S.C. § 541(a) (2) and are not enforceable." H.R. Rep. No. 934, 98th Cong. 2nd Sess., 19, 59 (1984) *reprinted in* U.S. Cong. Code & Ad. News, 4655, 4696. Once a property owner has granted or is obligated to grant an easement for utilities, the owner cannot turn around and deny a franchised cable operator access to those same utility easements or deny the operator the concommitant use of rights-of-way, however designated, to prevent access to those easements.

See Centel Cable Television Company of Florida v. Burg & Divosta, supra, opinion at 6 ("the Cable Act does not permit a developer to grant access to one cable operator and to deny it to another"). Any denial of access amounts to a "private arrangement" forbidden by the Cable Act. Designating access rights-of-way or compatible easements as "private" contravenes the Cable Act because it is a direct attempt to deny access to use utility easements dedicated to compatible uses.

5. Under the Cable Act, easements need not be "publicly" dedicated. The legislature did not place any special significance on the meaning of the term "dedicated" over and above its common meaning "to set aside." As stated in the Committee Report:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorized the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission.

1984 U.S. Code Cong. & Ad. News at 4696.

In *Cable Holdings of Georgia, supra*, the court clearly and unambiguously held that "the language of the section contains no requirement that the easement be dedicated for public use. Moreover, Defendants have not pointed to any legislative history supporting their strained interpretation of Section 621(a)(2)." 678 F.Supp. at 873. The court concluded that

"Defendants' argument that Section 621(a)(2) grants a right to construct only through publicly-dedicated easements must be rejected." *See also Centel*, 835 F.2d at 1362, n.5 ("The legislative history informs us that congress intended to authorize the cable operators to 'piggy-back' upon utility easements 'dedicated for electric, gas or other utility transmissions.' "). The legislative history, as recognized in *Cable Holdings of Georgia*, clearly supports the proposition that the term "dedicated" was not to be used in its strictest sense, but is to be liberally construed to apply to any actual utility lines.

6. Similarly, the FCC has also declined to take a restrictive view of Section 541(a)(2) and has, in its comments to the proposed rules implementing the Cable Act, provided, in relevant part, as follows:

> Section 621 also authorizes construction of a cable system over public rights-of-way and through easements designated for compatible uses such as those used for utilities. Thus, a property owner that has already granted or is obligated to grant an easement for utilities cannot deny cable access.

49 Fed. Reg. 48769 (1984). Subsequently, in the FCC's commentary accompanying the formal adoption of the proposed rules implementing the Act, the FCC clarified its use of the word "designated" in the commentary to the proposed rules and observed that it did not intend to expand or restrict the phrase "dedicated for compatible uses" used in the Cable Act. The FCC did observe that "we find that a cable system does have the right to access through an easement as long as the other conditions of the section are met." 50 Fed. Reg. 18647 (1985).

7. This Court concludes that any private agreements made by defendants with other utilities or entities and any dedications to other utilities or entities cannot be used by defendants to thwart Centel's access to the platted or otherwise granted utility easements, nor can any classification of the rights-of-way as private be used to deny Centel the means of accessing the easements. To hold otherwise would defeat the purpose of

the Cable Act and would deny Centel its statutory right of access to easements dedicated to compatible uses.[1]

Any attempts to circumvent the congressional prohibitions on private agreements which are created or designed to deny a franchised cable operator access to utility easements or the means of accessing those easements will be considered futile

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1 Florida common law on easements is consistent and in harmony with federal law. There is an implied right-of-way to and from utility easements dedicated to compatible uses.

While an easement gives no right to possess the land upon which it is imposed, the party in which an easement is vested has the right to the enjoyment thereof. *Florida Power Co. v. Neely*, 125 So.2d, 311, 315-316 (Fla. 2d DCA 1960), *cert. denied*, 138 So.2d 341 (Fla. 1961). The holder of an easement, "has the right of user superior to that of the servient fee owner." *Kitzinger v. Gulf Power Co.*, 432 So.2d 188 (Fla. 1st DCA 1983). There is an implied right to do what is necessary for the full enjoyment of the easement and that right accompanies every easement. *Crutchfield v. F.A. Sebring Realty, Co.*, 69 So.2d 328, 330 (Fla. 1954). The right, however, must be exercised in a reasonable manner so as not to injuriously increase the burden on the servient estate. *Id.* This rule also applies to rights-of-way. *See Walters v. McCall*, 450 So.2d 1139, 1142 (Fla. 1st DCA 1984).

Other state courts have all recognized that the installation of cable lines within already existing easements does not present any additional burden on a landowner's property and, therefore, the landowner has no standing to object thereto. *See Henley v. Continental Cablevisions of St. Louis County, Inc.*, 692 S.W. 2d 825 (Mo. App. 1985); *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3rd 798, 212 Cal. Rptr. 31 (Cal. App. 2d 1985); *Hoffman v. Capital Cablevision System, Inc.*, 52 App. Div. 2d 313, 383 N.Y.S. 2d 674, *appeal denied*, 40 N.Y. 2d 806, 390 N.Y.S. 2d 1025 (1976); and *Jolliff v. Hardin Cable Television Co.*, 26 Ohio 2d 103, 269 N.E.2d 588 (1971).

The holder of an express or deeded easement "has essentially the right of free passage over the easement to the degree and amount contemplated by the parties." *Tortise Island Communities, Inc. v. Roberts*, 394 So.2d 568, 569 (Fla. 5th DCA 1981). Further, the servient estate owner may not use his land in a way which will interfere with the easement holder's right of passage. *Id.* at 569. *See also United States v. Sea Gate Inc.*, 397 F.Supp. 1351, 1353 (D.N.C. 1975) ("The owner of an estate subject to an easement cannot use the fee in a fashion that obstructs or materially impairs the easement holder's use and enjoyment of his rights under the easement"); *United States v. O'Block*, 788 F.2d 1433, 1436 (10th Cir. 1986) (an injunction is proper to prevent interference with an easement holder's rights).

and an evasion of the intent, purpose and language of the Cable Act.

8. Without the right of passage to, from and over the utility easements, the holder of the easements cannot fully enjoy their use. In this case, full enjoyment of a utility easement would encompass the installation construction, maintenance and operation of the utility. If the utility operator has no means of accessing the easements, then its full enjoyment is denied. Centel's full enjoyment of the use of the utility easements for installation, construction, maintenance and operation of its cable system would be denied if it cannot gain reasonable access to and from the easements. This Court concludes that the use of the rights-of-way, however designated by defendants on Plat 2, is a right accompanying the use of the utility easements, without which the full enjoyment of those easements can never be obtained.

9. This Court concludes that the Eleventh Circuit Court of Appeals decision in *Centel Cable Television Company of Florida v. Admiral's Cove Associates, Ltd., supra*, is dispositive on defendants' claim of unconstitutionality. Congressional authorization to use easements dedicated to compatible uses does not amount to an unconstitutional taking of private property because "once an easement is established for utilities, it is well within the authority of Congress to include cable television as a user." 835 F.2d at 1363 n.7.

THE FLORIDA PLATTING ACT GIVES CABLE OPERATORS THE RIGHT TO ACCESS THE PLATTED UTILITY EASEMENTS.

10. The Florida Legislature intended to create an implied private right of action for cable operators to seek redress under *Fla. Stat.* § 177.091(29) when a recorded plat denies any franchised cable operator access to platted utility easements and/or excludes such operator from using the easements for the purpose of constructing, installing, maintaining or operating cable television services, in violation of § 177.091(29).

11. Although the legislature did not expressly create a right of action under § 177.091(29), a right of action will be implied if the plaintiff is in the class of persons whom the statute intends to protect. *See Colonial Penn Communities, Inc. v. Crosley*, 443 So.2d 1030, 1032 (Fla. 5th DCA 1983). "Implied provisions of statutory law are as effective as the express provisions, when such are judicially declared to exist." *Getzen v. Sumter County*, 103 So. 104, 107 (Fla. 1925).

12. A statute "should be construed in light of the manifest purpose to be achieved by the legislation." *Philip Crosby Associates, Inc. v. St. Broad of Independent Colleges*, 506 So.2d 490, 492 (Fla. 5th DCA 1987). The cardinal rule of statutory construction is that legislative intent controls and "that intent is determined primarily from the language of the statute." *St. Petersburg Bank and Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla. 1982). When a statute is in need of interpretation of construction, a court should first consider the plain meaning of the statutory language. *St. Petersburg* at 1073. A court should also consider the evil to be corrected by the legislation, the subject regulated and the object to be obtained. *Smith v. Ryan*, 39 So.2d 281, 283 (Fla. 1949).

13. Section § 177.091(29), Florida Statutes, governs the recording of platted utility easements and mandates that:

> All platted utility easements *shall* provide that such easements *shall* also be easements for the construction, installation, maintenance, or operation of cable television services . . . (emphasis added)

The word "shall" when used in statutes, has according to its normal usage, a mandatory connotation. *Florida Tallow Corp. v. Bryan*, 237 So.2d 308, 309 (Fla. 4th DCA 1970). Section (29) was added to § 177.091 as an amendment and became effective on October 1, 1987.

14. Although § 177.091(29) does not define the phrase, "cable television services," § 166.046, Florida Statutes, (which governs cable television franchising), also effective October 1,

1987, defines "cable service" in the same manner as the Cable Act:

> (a) "Cable Service" means:
>
> 1. The one-way transmission to subscribers of video programming or other programming service; and
>
> 2. Subscriber interactions, if any, which is required for the selection of such video programming or other programming service.

"Statutes that relate to the . . . same class of persons or things or to the same or closely allied subject or object are regarded as in *pari materia*," *Lanier v. Bronson*, 215 So.2d 776, 780 (Fla. 4th DCA 1968), and should be construed together. *Markam v. Blount*, 175 So.2d 526, 528 (Fla. 1965). "A statutory definition of a word is controlling and will be followed by the courts." *Erwin v. Capital Weekly Post*, 97 So.2d 464, 469 (Fla. 1957). Both § 177.091(29) and § 166.046 address cable television services in Florida.

15. The definition of cable service set forth in § 166.046(a)(1) and (2), can be used as the definition for cable television services in § 177.091(29), for the purpose of determining the legislative intent as to the class of persons protected by § 177.091(29). Centel is engaged in the distribution of "cable service" within the meaning of § 166.046(a)(1) and (2), Florida Statutes, and is a cable television company within the plain meaning of the phrase set forth in § 177.091(29).

16. By analogy, pursuant to 47 U.S.C. § 541(a)(2) of the Cable Act, franchised cable operators are the class of persons who have the authority to construct cable systems over public rights-of-way and through easements dedicated to compatible uses. *Centel Cable Television Company of Florida v. Admiral's Cove Associates, Ltd., supra.* Franchised cable operators belong to the class of persons which have the federal right of access to such rights-of-way and easements. It is clear that by enacting § 177.091(29), the Florida legislature intended to piggyback 47 U.S.C. § 541(a)(2) by protecting the class of

people comprised of cable companies franchised in Florida and their right to use platted utility easements for the construction, installation, maintenance or operation of their cable television systems. Equally as clear is the legislature's intent to protect the concommitant right of access pursuant to those platted utility easements. It must be presumed that the legislature intended an amendment to serve a useful purpose. *Arnold v. Shumpert*, 217 So.2d 116, 119 (Fla. 1968). Any denial of access to a platted utility easement would thwart the purpose of § 177.091 (29).

17. Defendants argue that if any right of action exists under § 177.091, it only inures to the benefit of the purchasers of platted land, and they claim that since Centel is not a member of the class of land purchasers protected by § 177.091, Centel has no right to enforce § 177.091(29). Defendants' argument is misplaced. The scope of Section (29)'s protection is limited to a distinct class of persons, franchised cable operators who use platted utility easements for the purpose of constructing, installing, maintaining or operating their cable services. On its face, Section (29) does not contemplate the purchase of platted lands.

18. By enacting Section (29), the Florida legislature carved an exception to the general public purpose underlying the Plat Act. "When a statute is amended, it is presumed that the Legislature intended it to have a different meaning from that accorded to it before the amendment. *State Dept. of Commerce, Div. of Employment Security v. Hart*, 372 So.2d 174, 176 (Fla. 2d DCA 1979); *Arnold*, 217 So.2d at 119. "The last expression of the legislative will is the law in cases of conflicting provisions in the same statute or in different statutes; the last in point of time or order of arrangement in such statutes prevails." *State v. City of Boca Raton*, 172 So.2d 230, 233 (Fla. 1965); *Askew v. Schuster*, 331 So.2d 297, 300 (Fla. 1976). It is the general rule that conflicting parts of statutes should be reconciled and harmonized whenever possible. *Zedalis v. Foster*, 343 So.2d 849, 850 (Fla. 2d DCA 1976). The law favors a rational, sensible construction of statutes and no interpretation should

be given which leads to a ridiculous or unreasonable conclusion or to a purpose not designated by the legislature. *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1281-82 (Fla. 1983).

19. The only rational conclusion to be drawn from the enactment of Section (29) is that the legislature intended to protect cable companies/operators from an evil other than a developer's failure to record facts on a plat which would place a potential innocent purchaser on notice. Such evil is the denial of the use of platted utility easements and the denial of access to those easements. Since Section (29) was recently enacted, its underlying purpose prevails over any conflicting general purpose which inures to the benefit of the public. The general purpose, however, can be harmonized with the purpose underlying Section (29) because that Section (29) is a statutorily created exception, as it was intended to be. "A statute should be construed so as to give effect to each and all of its provisions." *Cilento v. State*, 377 So.2d 663, 666 (Fla. 1979).

20. To prevent undermining the right of access, Section (29) also establishes a corresponding duty to grant access through platted utility easements and such duty is imposed upon developers who record the plat, utilities using such easements and any other person whose lands are affected by such easements. Any other interpretation of Section (29) would contravene the legislature's intent to protect franchised cable companies/operators. "If a statute grants a right or imposes a duty, it also confers, by implication, every particular power necessary for the exercise of the one or the performance of the other." *Girard Trust Co. v. Tampashores Development Co.*, 177 So786, 788 (Fla. 1928).

The duty to act under Section (29) by granting access to platted utility easements is for the benefit of the class of persons comprised of franchised cable companies/operators and when a member of the class is injured by the breach of such duty, there is standing to bring suit. *Girard, supra.*

This Court concludes that Centel has an implied private right of action and has standing to enforce violations of the Plat Act.

21. On or about January 20, 1988, three months *after* the effective date of § 177.091(29), White recorded the Plat for the St. Lucie West development. On its face, White's Plat excludes all cable operators, other than SLW Utilities from constructing and installing a cable system in the utility easements platted for the St. Lucie West development. The Plat also excludes all cable operators, other than SLW Utilities from maintaining or operating a cable television service.

22. Since there exists a right of action to enjoin violations of § 177.091(29), this statute, which piggybacks the Cable Act, requires mandatory access to platted utility easements in Florida and such access cannot be denied by arrangements limiting, characterizing or designating the easements or rights-of-way in a manner to exclude franchised cable operators. Such exclusionary terms would violate the Cable Act and would render the Florida Act a nullity.

Where a statute expressly or impliedly provides the right to use an easement or right-of-way for a particular purpose, a developer cannot exclude the entity possessing that right from using the easement or right-of-way. *Gulf Properties of Alabama, Inc. v. Southern Bell Telephone and Telegraph Company*, 346 So.2d 1085 (Fla. 1st DCA 1977) (it is against public policy for a developer to reserve exclusive rights to the provision of utility services when a statute authorizes the utility to provide for such service).

23. Section 177.071(29) is on point. It was enacted before the formulation of the SLW Cablevision Co. joint venture and before White platted the utility easements and rights-of-way. The Florida Plat Act defeats defendants' claim that it would deny access to a cable operator based upon the dedicated easements and rights-of-way in Plat 2.

Although the Cable Act preempts state law where Congress has spoken, when a state statute comports with the Act and provides the same, additional or expanded rights, the statute is enforceable. Further, where Congress is silent, the state statute governs if it is in harmony with the scope and intent underlying the federal Act.

INJUNCTIVE RELIEF

24. When determining whether a permanent injunction should issue, the court must first consider whether the plaintiff has succeeded on the merits. *El Greco Products Co., Inc. v. Shoe World, Inc.*, 599 F.Supp. 1380, 1390 (E.D.N.Y. 1984) *rvd. other gds.*, 806 F.2d 392 (2nd Cir. 1986), *cert. denied*, 108 S.Ct. 71 (1987); *State ex rel Guste v. Lee*, 635 F.Supp. 1107, 1125 (E.D. La. 1986).

If the plaintiff succeeds on the merits, the court must then decide whether the balance of equities favors injunctive relief, whether the plaintiff has an adequate remedy at law and whether it is in the public interest to grant such relief. *El Greco, supra*; *Lee, supra*. The equitable principles to be considered with regard to granting either permanent or preliminary injunctive relief are the same. The basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *El Greco, supra*. Irreparable harm is not an independent prerequisite for obtaining permanent injunctive relief; it is often a basis for showing the absence of an adequate remedy of law. *Lee, supra*; *Lewis v. S.S. Baune*, 534 F.2d 1115, 1123-24 (5th Cir. 1976); *International Union, United Auto Workers, Aerospace and Agr. Implement Workers of America, UAW v. Mack Trucks, Inc.*, 820 F.2d 91 (3rd Cir. 1987). Further, the absence of justification for the violation of clear statutory rights virtually eliminates the necessity of showing irreparable harm. *Storer Communications, Inc. v. Mogel*, 625 F.Supp. 1194, 1202 (S.D. Fla. 1985).

25. This Court concludes that Centel has prevailed on the merits. Defendants argue, however, that Centel is not entitled to injunctive relief on equitable grounds because Centel wanted an exclusive service contract with White and defendants' actions in plating the easements and dedications involved the same conduct which was the desire for exclusivity. This Court rejects defendants' argument based on the "clean hands" doctrine because it does not apply to the facts in the case at bar.

26. Conduct constituting "unclean hands" must be connected with the matter in litigation and must affect the adverse party.

Pennington v. Pennington, 390 So.2d 809, 810 (Fla. 5th DCA 1980). In Florida, unclean hands is equated with "sneaky and deceitful" conduct. "Equity will stay its hand where a party is guilty of conduct condemned by honest reasonable men. Unscrupulous practices, overreaching, concealment, trickery or other unconscientious conduct are sufficient to bar relief." *Hensel v. Aurilio*, 417 So.2d 1035, 1038 (Fla. 4th DCA 1982). The doctrine applies only when there has been inequitableness or bad faith relative to the matter to which relief is sought. *ITT Community Development Corp. v. Barton*, 457 F.Supp. 224 (M.D. Fla. 1978).

27. On the facts of this case, this Court concludes that Centel did nothing improper regarding the access issues in litigation under the Cable Act and the Plat Act. The defendants' conduct contravened the statutes, not Centel's conduct. Centel's proposal regarding exclusivity was based upon the defendants' position on access control. Centel did not deny access to a franchised cable operator. Defendants were not adversely affected by Centel's proposal; they invited such a proposal by the position they took and then failed to respond to Centel.

28. This Court concludes that Centel has demonstrated the existence of irreparable injury. First, defendants' violation of the Cable Act and the Plat Act virtually eliminates the need for Centel to demonstrate such injury because such injury is presumed upon a finding that the statutes have been violated. Second, testimony established the difficulty of computing costs and damages if Centel is forced to wait until St. Lucie West is completely developed and there are homeowners occupying most of the subdivisions before Centel could install its cable system. As this Court has previously stated, early entry into a development is of paramount importance to a cable operator. Early access avoids the expense of trenching through property and then repairing the damages. Early access also promotes effective competition between franchise cable operators. A denial of access hinders competition because the cable company which is *not* denied access can install and market its sys-

tem to the ultimate consumer, the homeowner, long before the company which is denied access can even install its system. The company denied access would be virtually eliminated from the market because it would be unable to catch up with the company whose system is already installed. The operator who can first install and then market its system would corner the market to the disadvantage of the operator denied access. Courts have held that the irretrievable loss of subscribers constitutes irreparable damage entitling a plaintiff to injunctive relief. *Subscription TV of Greater Washington v. Kaufman*, 606 F.Supp. 1540, 1540 (D.C. D.C. 1985); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Dir. 1980). There is injury when a cable operator is placed at a competitive disadvantage, *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), and a severe financial and competitive disadvantage warrants imposition of an injunction. *See Cox Cable Communications, Inc. v. Simpson*, 569 F.Supp. 507, 517 (D. Neb. 1983). Once a homeowner has wiring for one system, it is likely that it would choose to utilize only that system because a subscriber would have no incentive to change companies. If homes were wired for both systems, then the homeowner has the choice of which system would better serve its needs. This choice promotes competition and prevents cornering the market by one cable company over another.

29. In this case, SLW Cablevision Co. has the distinct advantage over Centel because defendants denied Centel access to the development while permitting SLW Cablevision to install its system. If Centel had to wait until St. Lucie West was developed, Centel would be eliminated from the market by SLW Cablevision Co. and it could never catch up. Therefore, this Court finds that the denial of access creates irreparable injury because it hinders competition and promotes one company over the other without justification. It is very difficult, if not impossible, for Centel to compute the damages of loss of marketing sales, loss of goodwill, loss of business reputation and the loss of profits from an indeterminable number of customers. Under the circumstances of this case, the injury to

Centel is irreparable and Centel has no adequate remedy at law. *See Centel v. Burg & Divosta, supra.* Elimination from the marketplace cannot be compensated in monetary damages.

Section 601 of the Cable Act, 47 U.S.C. § 521 sets forth several public purposes of the Act. These purposes include establishing both "a national cable policy concerning cable communications" and "standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;" assuring "that cable communications provide the widest possible diversity of information sources and services to the public;" and "promoting competition in cable communications and [minimizing] unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 541(1)(2)(4) and (6). Denial of early access as well as private agreements which thwart access undermine these public purposes.

30. This Court concludes that it is in the public interest to issue a permanent injunction because the public is entitled to receive "the widest possible diversity of information and services" as well as a communications system responsive to the public's needs and interests. Granting a permanent injunction will advance the public purposes set forth by Congress in the Cable Act.

WHEREFORE, this Court hereby orders and adjudges that Defendants WHITE, ST. LUCIE WEST COUNTRY CLUB ESTATES ASSOCIATION, ST. LUCIE WEST UTILITIES, INC. and St. Lucie West Cablevision, Inc. and each of them, their partners, subsidiaries, affiliates, officers, agents, representatives, servants, employees, attorneys, privies and all persons in active concert and participation with them are permanently restrained from:

1. Denying Centel access to the new community development known as St. Lucie West, for the purpose of constructing a cable system utilizing public rights-of-way and easements dedicated for compatible uses, including all utility easements and denying Centel use of all ease-

ments or rights-of-way however designated for the purpose of gaining access to the utility easements, such easements or rights-of-way being for ingress or egress to the utility easements and those include rights-of-way and easements which the other utilities are entitled to use, even if they have not used same;

2. Interfering with Centel's construction of a cable system at St. Lucie West utilizing public rights-of-way and easements dedicated for compatible uses, including all utility easements; and interfering with Centel's use of the easements and rights-of-way however designated for the purpose of gaining access to the utility easements, such easements or rights-of-way being for ingress and egress to the utility easements and include those rights-of-way and easements which the other utilities are entitled to use, even if they have not used same;

3. Interfering with Centel's solicitations of subscribers to its cable service at St. Lucie West; and

4. Allowing utility companies, including St. Lucie West Utilities, Inc., and St. Lucie West Cablevision Co. which have access to St. Lucie West and are utilizing rights-of-way and easements compatible for use with a cable system from engaging in any construction that could impede or delay Centel's use of such rights-of-way and easements.

This Court further orders that incorporated into this Order for Permanent Injunction is this Court's Order of November 12, 1988 *nunc pro tunc* to September 12, 1988 which provides Centel with a 30-day catch-up period within which to install its cable system before the parties are permitted to market their respective systems.

DONE AND ORDERED, this 28 day of FEBRUARY, 1989.

/s/ NORMAN C. ROETTGER
Norman C. Roettger
DISTRICT COURT JUDGE

Copies furnished to:

Terry S. Bienstock, P.A.
Wes Harvin

APPENDIX T

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30103 CA
HON. BENJAMIN F. GIBSON

UNITED CABLE TELEVISION OF MID-MICHIGAN,
a Delaware corporation,

Plaintiff,

—VS.—

LOUIS J. EYDE LIMITED FAMILY PARTNERSHIP, *et al.*,

Defendants.

OPINION

Plaintiff, United Cable Television of Mid-Michigan, Inc. (hereinafter "United"), brings suit against the defendants Louis J. Eyde Limited Family Partnership, George F. Eyde Limited Family Partnership, Louis J. Eyde and George F. Eyde seeking a preliminary injunction preventing them from interfering with the installation of cable television lines at their Club Meridian Development (hereinafter "Club Meridian"). As part of this project, the defendants granted Consumers Power Company (hereinafter "Consumers") an easement to be used for the placement of exterior utility lines to Club Meridian. United alleges that the defendants have prevented it from placing cable television lines on the easement in violation of the Cable Communications Policy Act of 1984.

On November 9, 1989, United sought a temporary restraining order from this Court to ensure that its access to the easement was not impaired by the defendants. After two conference calls with the parties' counsel, the Court issued a temporary restraining order and scheduled a hearing on the merits of United's request for a preliminary injunction for November 16, 1989. A hearing was held on that date by the Court and the temporary restraining order extended until 5:00 P.M. on November 20, 1989 so that the Court could consider the request for a preliminary injunction and issue a written opinion.

In determining whether to issue a preliminary injunction, the Court is to consider the following:

1. Whether the plaintiff is likely to succeed on the merits of the action;
2. Whether the plaintiff will suffer irreparable injury if the injunction is denied;
3. Whether the defendants will suffer irreparable harm if an injunction is granted; and,
4. Whether such an injunction would be in the public interest.

The court will discuss each of these elements separately.

Defendants argue that United does not have the right to bring a private cause of action under Section 621(a)(2) of the Cable Act. Section 621(a)(2), in the pertinent part, provides:

> Any [cable television] franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements . . . which have been dedicated for compatible uses . . . .

47 U.S.C. § 541(a)(2). The express terms of this statute purport to create a legal right. Thus, the threshold question presented in this case is whether this provision creates a private right of action in favor of a cable television franchise seeking access to compatible easements.

Although the Sixth Circuit has not addressed the issue of whether Section 621(a)(2) creates a private right of action, the question has been addressed by the Eleventh Circuit. In *Centel Cable Television Co. v. Admiral's Cove Assoc.*, 835 F.2d 1359 (11th Cir. 1988), the Court held that a cable company had an implied right of action under Section 621(a)(2) to compel access to compatible easements. *Id.* at 1364. In reaching this conclusion, the court had to ascertain whether Congress, by implication, intended to create a private right of action. *See e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). In order to determine whether Congress intended such a remedy, the Court had to consider the following factors:

1. Whether the plaintiff was a member of the class for whose especial benefit the statute was enacted, i.e., did the statute create a federal right in favor of the plaintiff;
2. Whether there was any indication of legislative intent, explicit or implicit, to create or deny such a remedy;
3. Whether it was consistent with the underlying purposes of the legislation to imply a remedy for the plaintiff; and
4. Whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely upon federal law.

Cort v. Ash, 422 U.S. 66, 78 (1975). The Eleventh Circuit determined that each of the four factors indicated a congressional desire to provide a private cause of action.

The Court agrees with the reasoning of the *Admiral's Cove* opinion. By its terms, Section 621(a)(2) authorizes cable franchises to use easements dedicated to compatible uses. In addition, the legislative history indicates that Congress intended to permit cable franchises to "piggyback" on easements "dedicated for electric, gas or other utility transmission." H.R. Rep. No. 934, 98th Cong., 2d Sess. 59, [hereinafter Legislative History], *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4696. The Cable Act was enacted "to create an environment in which cable would flourish, providing all

Americans with access to a technology that will become an increasingly important part of our national communications network." *Id.* at 20, *reprinted in* U.S. Code Cong. & Admin. News at 4657. Thus, an important objective of the Cable Act was to alleviate or minimize the patchwork of federal, state and local laws regulating the cable television industry. Accordingly, the Court believes that a private right of action in favor of cable television franchises would be consistent with the congressional intent and purposes behind the Cable Act and would not intrude into an area traditionally relegated to state law. For these reasons, this Court adopts the reasoning of the *Admiral's Cove* opinion and holds that there is a private right of action for cable operators under Section 621(a)(2) of the Cable Act.

The defendants claim that the Sixth Circuit decision in *Continental Cablevision of Michigan, Inc. v. Edward Rose Realty, Inc.*, No. 87-2001 (6th Cir. Mar. 10, 1988), raises serious doubts about the existence of a private right of action under Section 621(a)(2). However in *Continental Cable*, neither party relied upon the Cable Act as a source for its respective rights in the dispute. No. 87-2001, slip op. at 5-6. Thus, the *Continental Cable* decision is readily distinguishable from the present case and the Court believes that the *Continental Cable* decision casts no doubt on the existence of a private right of action in the present case.

Having determined that a private right of action exists under Section 621(a)(2), the court must determine whether it is likely that United will succeed on the merits of this action. As stated above, Section 621(a)(2) provides that a franchise has the right to use any public right-of-way or easement which has been dedicated to a compatible use subject to safety concerns which are not present in this case. The defendants argue that a cable franchise's access to easements under Section 621(a)(2) is limited to publicly dedicated ones.[1] *See Cable Assoc. v. Town & Country Management Corp.*, 709 F.Supp. 582, 584 (E.D. Pa. 1989). Thus, they argue that even if the statute creates a private right of action, United will not succeed on the merits of this

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1 *See, e.g.*, Mich. Comp. Laws Ann. § 560.253 (West 1988).

case because Consumers' easement is a private one which has not been publicly dedicated under Michigan state law.

However, neither the statute nor the legislative history supports the defendants' position. First, the language of Section 621(a)(2) contains no requirement that the easement be dedicated for public use. Second, the legislative history contains no statements which would support the argument of the defendants on this issue. Actually, the legislative history supports the conclusion that Congress intended private easements to be within the scope of Section 621(a)(2) by stating that "[a]ny private arrangements which seek to restrict a cable system's use of such easements . . . which have been granted to other utilities are in violation of this section and unenforceable." Legislative History at 59, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4696. If Congress intended to permit access to only publicly dedicated easements, there would have been no need to include such a statement in the legislative history. Thus, the face of the statute does not create a distinction between public and private easements and the legislative history indicates that this lack of a distinction was intentional. Therefore, the Court rejects the defendants' argument that private easements are outside the scope of Section 621(a)(2) of the Cable Act.

Defendants argue that such a construction of the Cable Act creates an unconstitutional taking.[2] The Court, noting the presence of subsection C of Section 621(a)(2), disagrees with the defendants' position. Subsection C requires a cable operator to justly compensate the property owner for "any damages caused by the installation, construction, operation or removal of a cable system." 47 U.S.C. § 541(a)(2)(C). While this subsection does not explicitly mention just compensation for a taking of

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2 It is unclear to the court just what property the defendants suggest will be taken without compensation. A taking occurs when an additional servitude is added to the underlying property. If no additional burden is imposed, no taking of property occurs. *Greater Worcester Cablevision, Inc. v. Carbetta Enter., Inc.*, 682 F. Supp. 1244, 1259 (D. Mass. 1985). Since Consumers is currently constructing a trench in the disputed easement to place underground utility lines and the installation of cable television lines in that trench at this time would be compatible use of it, there may be no additional burden placed on the underlying property in the present case.

property that may occur, other courts that have considered Subsection C have held that it indicates a desire upon the part of Congress for just compensation to be paid for any taking which may occur as a result of the installation of the system. *See Centel Cable Television Co. v. Burg & Divosta Corp.*, 712 F. Supp. 176, 178 (S.D. Fla. 1988) (granting plaintiff's request for a preliminary injunction barring interference with the construction of a cable system due to the availability of just compensation under Section 621(a)(2)(C)); *Cable Holdings, Inc. v. McNeil Real Estate Fund*, 678 F. Supp. 871, 874 (N.D. Ga. 1986); *Greater Worcester Cablevision, Inc. v. Carabetta Enter., Inc.*, 682 F. Supp. 1244, 1259 (D. Mass. 1985). The Court agrees with the conclusions reached in these cases and holds that when Section 621(a)(2) is read in its entirety, it becomes apparent that Congress intended to grant cable operators the right to use easements which have been dedicated for compatible uses and establish a scheme that provides just compensation to the property owner for that use.[3] As such, no unconstitutional taking will occur as a result of United gaining access to Consumers' easement at Club Meridian.

To further support its conclusion that Section 621(a)(2) of the Cable Act creates a scheme entitling the property owner to just compensation, the Court notes the presence of unenacted Section 633 which would have prohibited a landlord from interfering with the construction or installation of any cable system, if such service had been requested by a tenant. Legislative History at 79-80, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4716-17. The legislative history for

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3 If Congress did not provide for just compensation for the taking of property that might occur under Section 621(a)(2), then the Section either (1) would be unconstitutional or (2) cannot be found to grant access to private easements. The latter interpretation, as stated above, would be contrary to Congress' intent in enacting the Cable Act. With regard to the former interpretation, the Court notes that a basic principle of statutory construction is that if a statute can be reasonably interpreted so as to avoid a constitutional problem, a reviewing court should give the questioned law that interpretation. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring); *INS v. Chadha*, 462 U.S. 919, 944 (1983). Interpreting Section 621(a)(2) as providing just compensation for the taking of property is consistent with this basic principle of statutory construction.

this section explicitly refers to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), striking down a New York statute affording cable operators access on the grounds that just compensation to property owners was not provided, and notes that Section 633 was drafted to comply with the constitutional requirements set forth in that decision. *Id.* at 80-81, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4717-18. Except for a provision detailing a method for determining what constitutes just compensation, Section 621(a)(2) fully incorporates the compensation provisions of unenacted Section 633. There is simply no basis for suggesting that Congress did not intend that property owners be justly compensated for whatever takings may occur as a result of the installation of cable facilities pursuant to Section 621(a)(2).

Therefore, the Court concludes that it is highly likely that United will prevail on the merits in this action. Thus, the first requirement for the issuance of a preliminary injunction has been met by the plaintiff.

Defendants further argue that the plaintiff has failed to show irreparable injury due to the presence of an adequate remedy at law, specifically, condemnation proceedings provided by a Meridian Township ordinance. The Court disagrees with this assertion for a number of reasons. First, United has entered into an agreement with Consumers and Michigan Bell to share the cost of constructing a joint trench that is currently under construction and which will be used to install various underground utility lines. Second, due to safety and traffic congestion concerns, it will in all likelihood not be possible to place cable television lines in the trench at a later date. In effect, United will be totally deprived of the benefits of its bargain with the other utility companies absent an injunction along with its right under the Cable Act to use the easement granted to Consumers by the defendants. The condemnation proceedings, mentioned by the defendants, are not an adequate remedy for such a deprivation.

The Court is also required to consider whether the defendants will suffer harm if the injunction is granted. Defendants

argue that an injunction would result in an unconstitutional taking of its property. They also argue that the harm of such a taking is presumed to be irreparable injury. *See United Church v. Medical Center Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982). However, a taking of property is unconstitutional only if it does not involve just compensation. As stated above by the Court, the Cable Act permits the defendants to seek just compensation for any taking that may occur as a result of the plaintiff's use of the Consumers' easement. *See Centel Cable*, 712 F. Supp. at 178. For this reason, the Court finds that the defendants will suffer no harm as a result of the issuance of a preliminary injunction.

Finally, the Court must consider whether the public would be benefitted by the issuance of a preliminary injunction. Congress, by its enactment of the Cable Act, has declared that use of easements dedicated for compatible uses by cable companies is in the public interest. The issuance of an injunction in the present case would serve that interest.

In conclusion, the Court holds that a cable franchise under the Cable Act is permitted to use both private and public easements which have been dedicated for compatible uses. Furthermore, the Cable Act creates a private right of action in favor of cable franchises to enforce that right and provides a scheme by which a property owner may seek just compensation for any taking of property that may occur as a result of the installation of a cable system. Finally, the plaintiff in this case has met all of the requirements necessary for the issuance of a preliminary injunction. Therefore, the Court grants plaintiff's motion for a preliminary injunction barring the defendants from interfering with the installation of cable television lines on the easement granted to Consumers and denies the defendants' motion to dissolve the temporary restraining order issued by the Court on November 9, 1989.

/s/ BENJAMIN F. GIBSON
Benjamin F. Gibson
U.S. DISTRICT JUDGE

DATED: November 20, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30103 CA
HON. BENJAMIN F. GIBSON

UNITED CABLE TELEVISION OF MID-MICHIGAN,
a Delaware corporation,

Plaintiff,

--v.—

LOUIS J. EYDE LIMITED FAMILY PARTNERSHIP, *et al.*,

Defendants.

ORDER GRANTING INJUNCTIVE RELIEF

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 20th day of November, 1989.

PRESENT: HON. BENJAMIN F. GIBSON,
U.S. DISTRICT JUDGE

In accordance with the Opinion dated November 1989, IT IS HEREBY ORDERED that plaintiff United Cable Television of Mid-Michigan's motion for a preliminary injunction is GRANTED and that the defendants' motion to dissolve the Temporary Restraining Order, issued by the Court on November 9, 1989, is DENIED.

IT IS FURTHER ORDERED that defendants, their agents and representatives and all other persons acting in privity or in

concert with the defendants are HEREBY ENJOINED, until further order of this Court, from interfering with, impeding, hindering or otherwise obstructing the plaintiff's use of Consumer Power Company's easement on the defendants' Club Meridian development for the placement and maintenance of cable television lines.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
Benjamin F. Gibson
U. S. DISTRICT JUDGE

(2)

No. 92-44

Supreme Court, U.S.
FILED
AUG 5 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CABLE HOLDINGS OF GEORGIA, INC.
d/b/a SMYRNA CABLE TV,

Petitioner,

v.

MCNEIL REAL ESTATE FUND VI, LTD., d/b/a LAKES APARTMENTS, THE ROBERT A. MCNEIL CORPORATION, ODC COMMUNICATIONS CORPORATION, and WOODSONG ASSOCIATES, LTD., d/b/a WOODSONG APARTMENTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DEBORAH C. COSTLOW
Counsel of Record
THOMAS C. POWER
WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700

Counsel for Respondents

Dated: August 5, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that § 621(a)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 541(a)(2), does not authorize franchised cable television operators to install cable facilities in nondedicated, wholly private easements without the consent of the property owner or easement holder?

2. Whether, if § 621(a)(2) permits franchised cable operators to install cable facilities in private easements without the consent of the property owner or easement holder, the statute is unconstitutional for failing to provide for payment of just compensation?

LIST OF PARTIES AND RULE 29 CERTIFICATION

All of the parties are listed in the caption, except as noted below.

National Operating Limited Partnership, a privately-held partnership, is the successor-in-interest of Appellants McNeil Real Estate Fund VI, Ltd. and Woodsong Associates, Ltd.

MaxTel Associates Limited Partnership has purchased all of the assets of Appellant ODC Communications Corp. Telemedia Associates Limited Partnership is the general partner of MaxTel Associates Limited Partnership, and Telemedia Associates, Inc. is the general partner of Telemedia Associates Limited Partnership.

Robert A. McNeil Corporation, the original property manager of the subject properties, has been replaced by Heideger Enterprises, which is a subsidiary of National Realty Advisers, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Cable Holdings of Georgia, Inc. d/b/a Smyrna Cable TV ("Cable Holdings"), operates a cable television system in Cobb County, Georgia pursuant to a franchise issued by the County. (R2-40-3)[1] Cable Holdings seeks the right to install and maintain cable facilities within two privately-owned apartment complexes, the Lakes Apartments and the Woodsong Apartments, and to provide cable programming to the residents, against the wishes of the property owners and without payment to them of just compensation for the permanent, physical occupation of their private property.

When suit was filed, the two apartment complexes were owned by Respondents McNeil Real Estate Fund VI, Ltd. and Woodsong Associates, Ltd., respectively, and managed by The Robert A. McNeil Corporation. (R3-44-5) (These entities will be referred to collectively as "McNeil".) ODC Communications Corporation ("ODC"), the remaining respondent, is a private cable operator, *i.e.*, a video services provider with no franchise obligation because its systems are located wholly on private property. (R3-44-5) 47 U.S.C. § 522(6) (1988). ODC, or its successor-in-interest, has been the exclusive provider of cable service to the apartments since 1985, pursuant to two virtually identical contracts with McNeil. (R3-44-10; R3-44-28)[2] ODC succeeded Cable Holdings, which had installed its facilities and operated as the exclusive provider of video program-

[1] Citations in this form are to the corresponding volume, document number, and page from the record before the Eleventh Circuit.

[2] Respondents McNeil and ODC dispute Cable Holdings' assertion, Petition at 4 n. 4, that the exclusivity provision in the contracts does not bar Cable Holdings from providing service.

ming to the properties until the expiration of its own contracts with McNeil.

Cable Holdings claims a statutory right to permanently, physically occupy existing easements which allegedly exist exterior and interior to the apartment complexes pursuant to the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (1988) ("Cable Act"), the statute which permits local governments to franchise cable television operators. 47 U.S.C. § 541(a)(1) (1988). In pertinent part, Section 621(a)(2) of the Cable Act provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses . . . .

47 U.S.C. § 541(a)(2) (1988). ODC and McNeil contend, and the Eleventh Circuit held, that the Cable Act's use of the term "dedicated" limits Cable Holdings' access to easements which McNeil has formally dedicated to the public for compatible uses. As the appeals court explained:

> In general, an easement is legally "dedicated" only when the private property owner relinquishes his rights of exclusion regarding the easement so that the general public may use the property. *See Black's Law Dictionary* 412 (6th ed. 1990). For example, a property owner who develops a subdivision will routinely "dedicate" corridors of land throughout the subdivision for general use by all utilities that service the subdivision.

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 606 (11th Cir. 1992) ("*Cable Holdings II*"). Since even Cable Holdings concedes the absence of dedicated easements, the appeals court remanded the case with instructions to enter judgment for McNeil and ODC.

Cable Holdings argues that the Cable Act also permits it to force access to non-dedicated easements, *i.e.*, easements created by a private arrangement in which the landowner grants access to one party, such as a specific utility, but retains the right to exclude all others. Although Respondents agree with the Eleventh Circuit that the Cable Act limits Cable Holdings' access to dedicated easements, they nevertheless presented evidence to show that any private easements at the properties are exterior to the buildings and therefore not compatible with the provision of cable service to tenants, since that requires installation of facilities inside the buildings. If no interior easements exist, Cable Holdings has no right to provide cable service even under its own construction of the Cable Act.

Evidence of private easements consists primarily of ODC's two contracts with McNeil. (R-3-44-10) Section 1.2 of the contracts grants to ODC an exterior easement of approximately 750 square feet over each complex. McNeil did not intend to grant easements interior to the buildings (R3-44-52), and ODC claims no interior easements. (R3-44-50) Georgia Power Company has also been granted exterior easements over the properties pursuant to private contracts. (R3-44-62 through 69) However, Georgia Power claims no easements interior to the apartment buildings. (R3-44-64, 70) The local phone company, Southern Bell Telephone and Telegraph Company, claims no easements of record, interior or exterior. (R3-44-146) There is no other evidence of easements, dedicated or private.

The district court agreed with Cable Holdings that the Cable Act grants cable franchisees access to private easements and found that ODC's easements extend into the building interiors. Accordingly, the court ruled that Cable Holdings could "piggyback" its facilities alongside those installed by ODC. (62a)[3] The district court did not enter final judgment, however, pending a determination of the amount of just compensation to be paid for the taking of

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[3] Citations in this form are to the appendix to Cable Holdings' petition.

a private easement. (63a) Subsequently, the district court reversed itself, ruling that just compensation need not be paid for the taking of private easements. (69a) Thus, final judgment was entered in favor of Cable Holdings permitting it to reconstruct its cable system along the existing ODC cable lines without payment of just compensation. (68a)

Respondents appealed, challenging the district court's construction of the Cable Act and its finding of interior ODC easements. Before the Eleventh Circuit, Cable Holdings argued that the lower court also permitted it to install facilities inside the apartments via the Southern Bell and Georgia Power utility lines. Respondents moved to strike that portion of Cable Holdings' brief on the grounds that the trial court had found no interior utility easements and that Cable Holdings had not appealed that ruling.[4]

The court of appeals initially deferred a ruling on the motion to strike, and then rendered the motion moot by ruling on the underlying merits of the case. As noted, the appellate court reversed the decision of the trial court, holding that the Cable Act does not grant franchised cable operators access to private easements. Because there are no dedicated easements at the McNeil properties, the Eleventh Circuit remanded the case with instructions to enter judgment in favor of McNeil and ODC.

Cable Holdings' petition for rehearing and suggestion of rehearing en banc, alleging a conflict with prior Eleventh Circuit cases, were denied. (73a)

SUMMARY OF ARGUMENT

The Eleventh Circuit's ruling that the Cable Act does not grant Cable Holdings the right to provide its service

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[4] Cable Holdings previously had acknowledged that it could not maintain facilities outside of the ODC easements when, in direct response to a question posed by the district court, Cable Holdings stated that it "was prepared to remove its system when ODC no longer enjoys the right to serve tenants over piggyback lines." (R7-108-1)

to the tenants of McNeil's apartment buildings is in harmony with the only other circuit court to have addressed the issue. These circuit court opinions, like those of other courts, are consistent with this Court's precedent holding that a private property owner has the unfettered constitutional right to repel a permanent, physical occupation of its property when, as here, there has been no valid exercise of eminent domain powers.

The language of the statute limits franchised cable operators to "dedicated" easements, *i.e.*, easements created by plat recordation or other formal offer which is accepted by the public. Congress could freely legislate that result since the property owner, by dedicating the easements for public use, waives any right to be compensated for the occupation and use of the easements. Since no dedicated easements exist at the McNeil properties, the Eleventh Circuit properly found that Cable Holdings has no right of access.

Congress considered a separate statutory provision that expressly granted franchised cable operators a right to serve tenants of multi-unit dwellings, even if such service required physical occupation of private property, but then rejected that proposal out of a concern for private property interests. Thus, Cable Holdings is seeking to enforce rights which Congress intentionally chose to withhold from franchised cable operators.

Congress' rejection of the forced right of access claimed by Cable Holdings comports with congressional policy in favor of head-to-head competition "at the property line" in the provision of cable programming, and against regulations designed to prop up one segment of the industry with special rights. In contravention of this policy, Cable Holdings would have this Court find that Congress intended to grant franchised cable operators a right of access to tenants of multi-unit dwellings, but to deny that right to alternative providers of cable programming.

Enforcement of such a right in this case, by granting Cable Holdings access to private easements, would destroy

the property owner's constitutional right to exclude others from its property. The Cable Act's omission of any provision for the payment of just compensation for the resulting taking of private property demonstrates congressional intent to leave intact the right of property owners to control access to their property and to decide for themselves whether and how cable television, like any other amenity, will be provided to their tenants.

For these reasons, this Court should deny the petition.

ARGUMENT

I. THIS COURT NEED NOT GRANT REVIEW BECAUSE THERE IS NO CONFLICT AMONG THE FEDERAL CIRCUITS AND THE DECISION BELOW IS IN COMPLETE ACCORD WITH THIS COURT'S TAKINGS JURISPRUDENCE.

The Eleventh Circuit has never ruled, and Respondents have never claimed, that there is no such thing as a dedicated easement *for* use by utilities. Such dedicated easements typically exist along public streets and highways and abut the private property edge of single family lots. On subdivision properties, such dedicated easements are often statutorily mandated and again usually are located between a street and the edge of the single family lot line. *See, e.g.*, Fla. Stat. ch. 177.081, 177.091 (1987); Cal. Govt. Code § 66410 *et seq* (West 1983). An easement is ordinarily dedicated via a plat recordation which clearly delineates the corridor of land *intended* by the property owner to be reserved for general utility usage on behalf of the public, and which is *accepted* as such by the municipality or county in which the subdivision is located.

Respondents maintain, and the Eleventh Circuit has consistently held, that Congress intended cable franchisees to have access to these types of easements, *i.e.*, "dedicated easements", in § 621(a)(2) of the Cable Act. Given such access, cable franchisees are not hindered in their deployment of "pass-through" trunk line throughout the franchise area. It is up to the single family homeowner,

however, as to whether the cable franchisee is permitted to install its drop or feeder line across the front or back or sideyard of the single family lot and into the single family home itself. This is so despite the existence of utility transmission lines which the single family homeowner has authorized to be installed to service the property. This is so even if the single family homeowner executed a formal easement document with a *particular* utility pursuant to which the utility installed its transmission line. Absent a dedicated easement reserving a strip of land for use by all utilities on behalf of the public, a cable franchisee has no right to force access to any portion of the private property of the single family homeowner, including any private easements negotiated and obtained by a particular utility for its own use.[5]

Section 621(a)(2) does not distinguish between the access rights afforded to cable franchisees on the basis of whether the property is single family or multifamily. With respect to multiunit dwellings such as condominia or rental properties, it is still up to the property owner, be it a landlord or a condominium association, to determine whether the cable franchisee installs its facilities across the front or back or sideyard of the private property and into the multiunit dwelling itself. Again, the existence of utility lines, even if installed pursuant to a contractually-obtained private easement, does not entitle the cable franchisee to force access.

It is true that the consistent construction of § 621(a)(2) by both the Eleventh and Third Circuits defeats access by cable franchisees to the *interior* of single family homes and multiunit dwellings. Yet the statutory language of § 621(a)(2), which specifically uses the term "dedicated",

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[5] For that matter, an electric or gas or telephone company could not force access to such private property without invoking and pursuing a condemnation action which would include due process and just compensation protections for the property owner. Nor could a municipality do so.

as well as the legislative history, prove that Congress never intended for cable franchisees to force their way into private dwellings.

A. *Cable Holdings II* Is In Complete Harmony With The Decisions Of Prior Panels Of The Eleventh Circuit.

The Eleventh Circuit has never authorized a cable franchisee to install cable facilities within a wholly private easement pursuant to § 621(a)(2), much less to force access to the interior of a multiunit dwelling via the use of such easements. The easements at issue in the Eleventh Circuit's decisions in *Centel Cable Television Co. v. Admiral's Cove Associates*, 835 F.2d 1359 (11th Cir. 1988) and *Centel Cable Television Co. v. Thos. J. White Development Corp.*, 902 F.2d 905 (11th Cir. 1990) were subdivision easements dedicated for general utility usage via plat recordation.[6] Cable Holdings admits as much. Petition at 11.

Indeed, the question of what substantive right, if any, was granted to cable franchisees under § 621(a)(2) of the Cable Act was not even at issue in *Admiral's Cove*. Rather, that panel determined only that Congress intended a private right of action for cable franchisees to enforce whatever access rights are actually conferred by the statute. In dicta, the panel stated that the type of easement at issue in the case, *i.e.*, an easement corridor dedicated by plat recordation for use by all utilities in general, was the type of easement intended by Congress to be accessible.[7]

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[6] Given the denial of Cable Holdings' petition for rehearing and suggestion of rehearing en banc (with no Judge requesting that the court be polled)(73a), Respondents are hard pressed to understand how Cable Holdings can claim that the *Cable Holdings II* decision conflicts with the decisions of prior panels of the Eleventh Circuit. The alleged "conflict" formed the very core of Cable Holdings' rehearing petition. The *Cable Holdings II* Court explicitly disagreed with Cable Holdings' overly expansive reading of the *Admiral's Cove* and *White* decisions and found its own decision to be in complete harmony with those rulings. *Cable Holdings*, 953 F.2d at 608-609.

[7] Under Florida law, developers of subdivision properties are required

Clearly, the single footnote takings analysis engaged in by the panel, *Admiral's Cove*, 835 F.2d at 1363 n. 7., did not contemplate forced access by a cable franchisee to the interior of multiunit dwellings via a private easement granted solely to a particular entity, be that entity a utility or, as in the instant case, a competing video services provider. This also explains why the *Admiral's Cove* panel did not find its access construction to implicate the constitutionality of § 621(a)(2), even if deemed to be devoid of any just compensation obligation, because the property owner, in dedicating property, waives any right to be compensated for the use of the dedicated easement corridor.

The *Admiral's Cove* construction of § 621(a)(2), albeit in dicta, was left unaltered by the Eleventh Circuit in *White*. The *White* panel simply held that a cable franchisee's right to install its facilities in an easement dedicated via plat recordation created an implied temporary right of ingress and egress over a separate private easement, *i.e.*, private roads, so as to gain access to the dedicated easement corridors. The cable franchisee merely needed a temporary route over which to transport its crew and vehicles to and from the dedicated easement, for the period of time it would take to install the cable facilities in the dedicated easement. No cable facilities were to be installed in the private roads.

Thus, the *White* case concerned dedicated easements through which the utilities were authorized to install their facilities and private roads over which the utilities were

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by statute to "dedicate" property for general public utility use. Fla. Stat. ch. 177.081, 177.091 (1987). Florida law also provides that all such platted public utility easements, which upon approval of the plat are considered dedicated to the public for the subsurface installation of public utility facilities, will similarly include cable franchisees as users of the dedicated easements. Fla. Stat. ch. 177.081, 177.091(29). Florida law itself recognizes the difference in mandating access, without any concomitant just compensation requirement, to public utility easement corridors conveyed by dedication as opposed to easements conveyed between private parties. The Florida statute *exempts* private utility easements from the access requirement: "[T]his section shall not apply to those private easements granted to or obtained by a particular electric, telephone, gas or other public utility." Fla. Stat. ch. 177.091(29).

granted permission to transport their vehicles and crews. As to the former, the *White* panel held that under the Cable Act, the developer could not "prevent a cable franchise [sic] from using *dedicated* utility easements." *White*, 902 F.2d at 909 (emphasis added). As to the private roads, the panel held that a dedicated easement "carries with it by implication the right . . . of doing what is reasonably necessary for full enjoyment of the easement itself." *Id.* at 907 n. 9. This transitory right of ingress and egress over private property attendant upon the use of a dedicated easement does not constitute a taking, there being no permanent physical occupation apart from the dedicated easement itself. The *White* panel, as in *Admiral's Cove*, did not directly reach the issue of whether § 621(a)(2) would be rendered constitutionally infirm if held to authorize a taking of private property, including a private easement, without the concomitant obligation to pay just compensation. Instead, the *White* panel ruled that § 621(a)(2) does not authorize the installation of facilities outside of a dedicated easement in any event.[8]

It is Cable Holdings, and not the *Cable Holdings II* Court, who has misunderstood what this Court has described as the "constitutional distinction between a permanent occupation and a temporary physical invasion." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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[8] Observing that the cable franchisee's failure precisely to track the dedicated easements, by installing "some of its cable one to three feet outside of the easement in a few places", was illegal under Section 621(a)(2), the panel directed the property owner "to prevent any such encroachment through a state court action for trespass." 902 F.2d at 911 n. 13. *See also Centel Cable Television Co. v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 178 (S.D. Fla. 1988) ("This Court also finds that [the franchised cable operator] has not sought nor does it have the right to install its cable system outside of the public rights-of-way and dedicated easements of the [private property]. [The franchised cable operator] has no right to run its cable television system directly to an individual [single family home] residence unless the owner of that [private] residence orders cable television service from [the franchised cable operator]").

419, 421 (1982).[9] *Cable Holdings II* posited a completely different set of facts than those at issue in *Admiral's Cove* and *White*: here the alleged easements are private, not dedicated; here access is sought to the interior of multiunit dwellings, not just to exterior pass-through easements in a single family home subdivision; here neither the property owner nor the easement holder have granted consent to Cable Holdings' occupation. Cable Holdings' reading of such prior panels is the distorted one, *i.e.*, that § 621(a)(2): (1) mandates permanent access to and occupation of private easements over the objection of the private easement holder and the landowner; (2) does not and must not provide for any payment of just compensation; and (3) is nonetheless constitutional. Cable Holdings seeks a construction which eliminates the concept of private easement rights from the fabric of the law.[10] The *Cable Holdings II* Court properly rejected Cable Holdings' construction of § 621(a)(2) and issued a decision in complete harmony with the *Admiral's Cove* and *White* rulings.

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[9] As this Court held:

> Our cases further establish that *when the physical intrusion reaches the extreme form of a permanent physical occupation*, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking *but also is determinative.*

458 U.S. at 426 (emphasis added).

[10] Cable Holdings seeks to tear down the legal barrier between "dedicated" and "private" easements only to benefit cable franchisees. All other purveyors of cable programming services using alternative delivery mechanisms, such as private or wireless cable operators, have to obtain their own rights from the landowner by private contractual agreement, as Respondent ODC did here. All utilities must do the same, as Georgia Power did here, or comply with eminent domain procedures in which the owner can contest the validity of the condemnation as well as the amount of compensation to be paid if the taking is permitted. A determination that Congress intended to grant access rights to cable franchisees even greater than those afforded providers of essential utility services defies all logic and established jurisprudence.

B. *Cable Holdings II* Is Consistent With The Only Other Circuit Court Decision And The Majority Of Lower Courts Which Have Addressed Forced Access To Multiunit Dwelling Interiors.

On nearly identical facts to the instant case, the United States Court of Appeals for the Third Circuit ruled that § 621(a)(2) does *not* grant cable franchisees any substantive right of access to private property:

> We find no support in the express language of the statute for [the] position that Congress authorized franchised cable companies to force their way onto private property, over the protests of the property owner, in order to offer cable television service to the tenants of the property owner.

Cable Investments, Inc. v. Woolley, 867 F.2d 151, 155 (3d Cir. 1989). The Third Circuit rejected the cable franchisee's demand for "access over *any easements* which have been set aside for uses compatible with cable television, *including those under private arrangement with the owner*." *Id.* (emphasis added). Like the *Cable Holdings II* Court, the Third Circuit concluded that Congress' refusal to pass § 633, which would have granted cable franchisees eminent domain powers, meant that § 621(a)(2) did not authorize access to multiunit dwelling interiors. *Cable Investments*, 867 F.2d at 156.[11]

The Third Circuit did not find its decision to be at odds with the prior decision of the Eleventh Circuit in *Admiral's Cove*, stressing that the type of access sought by the cable franchisee in the *Admiral's Cove* decision was drastically different. Noting that the cable company in *Admiral's Cove* sought installation "in open trenches through easements listed on recorded plats provided by a residential developer for electric and telephone utilities", the Third Circuit stated that the "substantive right sought to be enforced in [*Admiral's Cove*] is more limited than that

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[11] For a complete discussion of § 633, *see infra* at § I.D.

sought here, where [the cable franchisee] seeks access to tenants inside buildings owned by [the property owner]." *Id.* at 154. The Third Circuit is the only other federal circuit court to construe § 621(a)(2). Not even Cable Holdings alleges a conflict between the *Cable Investments* and *Cable Holdings II* decisions.

Many of the lower court opinions cited by Cable Holdings in support of its construction either involve access to classic dedicated easements such as those found in *Admiral's Cove* and *White*, *see Centel Cable Television Co. v. Burg & DiVosta Corp.*, 712 F. Supp. 176 (S.D. Fla. 1988); or to private easements *exterior* to multiunit dwellings, *see United Cable Television v. Eyde*, No. L89-30103 CA (W.D. Mich. Nov. 20, 1989) (preliminary injunction) (cable franchisee expressly did not seek access to the interior of multiunit dwellings); or to exterior private easements on single family home tracts, *see Booth American Co. v. Total TV*, No.CV-91-2286-RSWL (C.D. Cal. Jan. 31, 1992) (private residential single family home subdivision contained both dedicated and private easements); *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425 (Mich. Ct. App. 1990) (access to private easement traversing backyard of single family home property).[12] The *Mumaugh* Court even stated its complete agreement with the holding in the Third Circuit's *Cable Investments* decision that access could not be compelled to the interior of multiunit dwellings under § 621(a)(2):

> [W]e believe that *Cable Investments*, *supra*, is easily distinguished from the present case. Because the deleted proposed § 633 was directly applicable to the very issue presented in *Cable Investments*, the Court logically and properly concluded that Congress, by deleting this section, did not intend

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[12] The decision in *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422 (D. Md. 1989), granted access to exterior utility easements in a private single family home residential subdivision, but does not disclose whether such easements were dedicated or private.

> to allow cable operators to compel access to multi-unit apartment dwellings.

Mumaugh, 456 N.W.2d at 429.

Similarly, Cable Holdings' reliance on *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F. Supp. 1315 (D. Del. 1986), is misplaced since that court's construction of the Cable Act, issued on a motion for preliminary injunction, was overruled by the Third Circuit in *Cable Investments*.

Of the cases involving a claim of access to the interior of multiunit dwellings, the majority of courts have rejected such access. *See e.g., Media General Cable v. Sequoyah Condominium Council*, 737 F. Supp. 903 (E.D. Va. 1990), *appeal pending* No. 90-2399 (4th Cir. argued May 7, 1991) (district court refused to authorize cable franchisee to install facilities within the exterior or interior private easements of utilities or of the third-party cable operator with whom the property owner had exclusively contracted); *UACC-Midwest, Inc: v. Edward Rose & Sons*, No. 1:90-CV-383 (W.D.Mich. May 22, 1990); *Cable Associates, Inc. v. Town & Country Management Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989); *Cablevision of The Midwest, Inc. v. Gross*, No. 60703, 1992 WL 159769 (Ohio App. July 2, 1992); *Continental Cablevision v. Edward Rose Realty, Inc.*, No. L 87-17-CA5 (W.D. Mich. April 27, 1988).

C. *Cable Holdings II* Is Consistent With The Statutory Language Of § 621(a)(2).

Respondents do not claim, and the Eleventh Circuit has never held, that dedicated easements necessarily entail use by every member of the public. The term "dedicated easement" does not require the insertion of the word "public" in front of the word "easement" or "publicly" in front of the word "dedicated".[13] In fact, the term "dedicated"

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[13] Petition at 16. By contrast, the word "public" *is* necessary to modify "rights-of-way" since Congress did not intend cable franchisees physically to install cable facilities within private streets or roads without the permission of the property owner. Cable Holdings' construction of § 621(a)(2) thus leads to the illogical conclusion that Congress excluded cable franchisees from private streets but not from privately-contracted for easements.

standing alone defines the type of easement meant to be accessible, *i.e.*, a corridor of land relinquished by the property owner *not* to a single entity for a specified purpose, but reserved to the public *for* general utility usage or other usage compatible with cable installation. Even dictionaries of common usage recognize this meaning of "dedicate." *See* Webster's New Universal Unabridged Dictionary 474 (2d ed. 1983) ("in law, to devote (land, etc.) to public use").

Dedications can entail very broad or very narrow public uses. The fact that a dedication specifies a particular public use to be made of the property, or that that public use necessarily requires use by only a particular class of users, *e.g.*, utility companies, does not belie the overall public nature of the dedication. The property owner has essentially agreed, by the dedication, not to select the particular users of the land so dedicated or to retain rights of exclusion.[14] There is nothing in the statutory language nor the legislative history, *see infra* at § I.D., to indicate that Congress did not intend "dedicated" to have the historical meaning long employed in both common and statutory property law. The term "dedicated" was used; it must be treated as having significance. To deny that significance is to erase the term from § 621(a)(2). The *Cable Holdings II* Court properly examined the term "dedicated easement" in the real property context and found such usage consistent with the Cable Act's legislative history.

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[14] *See Media General*, 737 F. Supp. at 911 ("Dedication of a property interest occurs only when the owner unequivocally offers that interest to a public entity for public use and that entity unequivocally accepts it."); *Centel Cable Television Co. v. Cook*, Nos. 14-88-8, 14-88-10, 1989 WL 111980 at *5 (Ohio Ct. App. Sept. 27, 1989) (court refused to grant cable operator access to private easement over private land); *Kohler v. Warner Amex Cable Communications, Inc.*, No. 2-86-18, 1987 WL 18220 at *2 (Ohio Ct. App. Oct. 9, 1987) (since "the easement itself was not dedicated, like a street or alley, and was clearly a restricted right granted to one agency only and limited in its use to that agency," § 621(a)(2) has "no application to a right of way that was neither dedicated nor public").

D. *Cable Holdings II* Is Consistent With The Legislative History Of The Cable Act And Furthers Congressional Intent.

Congress expressly rejected passage of a proposed cable mandatory access provision in the Cable Act, *i.e.*, prior § 633 (79a), which would have specifically authorized cable franchisees to condemn property for the installation and operation of their cable facilities upon the payment of just compensation. Congress deliberately deleted § 633 so that property owners could retain the full right to negotiate for the provision of cable services from the supplier of their choice:

> I am particularly pleased with the version of the legislation before us today which differs slightly from the bill reported from the Commerce Committee in June. The bill before us today does not contain a provision I had particular concern about in committee, the so-called consumer access to cable. . . . Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better, more orderly manner *through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.* Fortunately, . . . *this objectionable section was deleted from this legislation.* . . .

130 Cong Rec. 27984 (daily ed. Oct. 1, 1984) (Statement of Rep. Fields) (emphasis added).[15]

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[15] By deleting § 633, Congress specifically rejected a mandatory right of access over private property for cable television franchisee's [sic] to provide their services. Owners of private property, *including owners of private easements*, are not compelled by the Act to grant franchisees access to their land or easements. Access pursuant to the Act may be had only through public rights-of-way or easements that have been dedicated to the public use.

Media General, 737 F. Supp. at 911 (emphasis added). *See also UACC-Midwest, Inc. v. Edward Rose & Sons*, No. 1:90-CV-383, slip. op. at 3

Even passage of § 633 would not have stripped property owners of their right to provide cable programming services via a supplier other than the cable franchisee. Congress sought to insure that residents had access to cable service from some provider, not to grant a single cable franchisee an unfair competitive advantage or to prefer it over other purveyors of cable programming services. Thus, § 633 exempted property owners who had already provided cable programming services to residents roughly equivalent to that offered by the cable franchisee claiming guaranteed access. Proposed § 633(h)(1).[16]

In deleting § 633, Congress' ultimate conclusion was that the marketplace would ensure residents had access to cable programming from some source without the need for government intervention. Congress opted for competition "at the property line", wherein the property owner selects from among the various cable suppliers competing for access to the premises. Congress was well aware that the property owner's choice could be an exclusive choice. Con-

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(W.D. Mich. May 22, 1990) ("The legislative history set forth in *Woolley* indicates that the deletion of § 633 was not an oversight but was a carefully considered decision. Congress was clearly divided on whether to grant mandatory access and those opposed to mandatory access prevailed.").

[16] Such an exemption proves Congress was *not* concerned that a multiunit residence would be served by a *single* supplier of cable programming services:

> The Committee believes that if a landlord or property owner provides residents of his premises with the ability to obtain a truly equivalent range of services, then the First Amendment goal of providing consumers access to as wide a diversity of information sources and services is not frustrated to the point that it requires a mandated right of access to cable service. *After all, the Committee's goal is to ensure that the public has access to a wide diversity of information—not to require that the information come from a particular source.*

H.R. Rep. 98-934, 98th Cong., 2d Sess. 81-82 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4718 (emphasis added).

gress simply chose not to remedy the alleged problem which Cable Holdings claims exists.

Given the co-existence of §§ 621(a)(2) and 633 in the Cable Act until Congress' last minute rejection of § 633, the sections could not have been intended to accomplish the same purpose.[17] Since § 633 would have compelled property owners to permit cable installation *anywhere* on the premises, including in private easements, there would have been no need for the simultaneous inclusion of § 621(a)(2) had that section been meant by Congress to grant access to wholly private easements. Moreover, while § 633 contained the exemption for property owners already providing cable programming services, § 621(a)(2), as Cable Holdings construes it, grants forced access to *all* easements, dedicated or not, used by utilities or not, without any such exemption. Quite simply, if Congress had meant for cable franchisees to have access to the interior of multiunit dwellings, Congress would have enacted § 633.[18]

Congress did not intend to eviscerate the right of property owners to convey land to a single entity for a single purpose. Rather, § 621(a)(2) was only intended to grant exterior access to dedicated easements voluntarily granted by the property owner for general utility usage. If access rights are restricted to dedicated easements, then the rights afforded by §§ 633 and 621(a)(2) are very different indeed: § 621(a)(2) representing a voluntary grant of access to exterior pass-through easements and § 633 representing forced access to dwelling interiors. If access rights are *not* so restricted, then the rights afforded by §§ 633 and

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[17] *See, e.g., Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197-200 (1913) (fact that provision was deleted before enacted conclusively establishes that the provision enacted meant something different); *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Thompson v. Kennickell*, 797 F.2d 1015, 1024 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 905 (1987).

[18] Indeed, under Cable Holdings' analysis of § 621(a)(2), a private homeowner could not lawfully resist a cable franchisee's efforts to install cable within the interior walls of the owner's home if easements existed there.

621(a)(2) are identical: both representing forced access to dwelling interiors.

Unlike § 633, § 621(a)(2) and its one paragraph legislative history do not speak in terms of gaining access to dwelling interiors. Undoubtedly, had Congress intended § 621(a)(2) to authorize such forced access, even under the more limited circumstances claimed by Cable Holdings, Congress would have discussed the interrelationship of the two sections and, upon the deletion of § 633, would have included legislative history language concerning forced access to dwelling units within § 621(a)(2). The fact that a consumer-tenant could trigger access under § 633, but not under § 621(a)(2) does not lead, as Cable Holdings advocates, Petition at 12-13, to the conclusion that private easements, express or "implied", were meant to be accessible.[19] Since § 621(a)(2) contemplates a voluntary dedication by the property owner automatically triggering cable franchisee access, consumer "permission" would be both redundant and irrelevant.[20] Under § 633, intended to cover circumstances in which the property owner refused access to dwelling units, consumers could override the property owner and trigger access, albeit with the full

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[19] Cable Holdings argued below that there is no distinction between utility lines and utility easements, or between the cable lines of a competitor and an easement. *See* Brief of Appellee at 26-27 n. 14. Yet if the installation of cable or utility lines always implies an easement, § 621(a)(2) would not have created a "more limited right of access" than that created in § 633 since there is not a single property, be it single-family, rental apartment, condominium, cooperative, or mobile home, that does not have at least an electric or telephone company *line* existing on the premises. Franchised cable operators would have had the same rights of access under § 621(a)(2) that Congress chose to withhold by deleting § 633.

[20] Cable Holdings errs in claiming that it is the cable franchisee that triggers access under Section 621(a)(2). Petition at 13. It is the property owner that triggers access by dedicating easements on the premises. The *Admiral's Cove* decision simply noted, in *discussing what party would have a private right of action* to enforce whatever rights were actually granted by the respective sections, that tenants might also have an enforcement right under Section 633. *Admiral's Cove*, 835 F.2d at 1362 n. 6.

payment of just compensation for the taking which such forced access would involve.

Cable Holdings' arguments render meaningless the exemption in § 633 for landlords who were already providing cable services roughly equivalent to those offered by the cable franchisee claiming a right of access. Proposed § 633(h)(1). If the installation of cable facilities by a non-franchised cable operator *implies* an easement, or if the property owner actually conveys an easement by private agreement, Cable Holdings asserts it can force access regardless of the existence of an alternative cable service provider. Yet § 633 and its legislative history make clear that Congress intended to permit exclusion of the franchised operator in that very situation. Accordingly, it is Cable Holdings who is subverting the Cable Act by claiming rights of access specifically rejected by Congress and greater than any rights possessed by utilities or even governmental bodies. All Congress meant to do by passing § 621(a)(2) was to ensure that cable franchisees, like utilities, could construct their main trunk line system throughout the franchise area by use of dedicated easements and public rights-of-way. Whether a single family homeowner or a landlord wants to invite the cable franchisee actually to install lines within a private dwelling in order to receive cable services is up to the individual private property owner.

In support of its radical excision of constitutionally protected private property rights, Cable Holdings relies on a single paragraph of legislative history which neither defines "dedicated" nor addresses the scope of the rights actually conferred. Petition at 17. Cable Holdings' discussion tellingly disregards as irrelevant Congress' repeated use therein of the qualifying term "dedicated" each time the word "easement" is referenced. In emphasizing a single sentence, *i.e.*, "[a]ny *private arrangements* which seek to restrict a cable system's use of *such* easements or rights of way which have been granted to other utilities are in violation of this section", to assert that it cannot be excluded from the apartment complexes at issue here, Cable

Holdings essentially equates "private *arrangements*" with "private *easements*". *Id.* (emphasis added). If Congress had meant private easements were forever gone from legal jurisprudence, Congress would have said so. Instead, Congress stated that private parties could not agree to restrict a cable franchisee's use of "*such* easements or rights-of-way", clearly referring back to the "public rights-of-way" and "easements dedicated for compatible uses" contained in the statute and the directly prior sentences in the same legislative history paragraph. Accordingly, a property owner who has already granted a dedicated easement for general utility usage cannot validly contract with a third party to exclude a cable franchisee *from the dedicated easement*. That was the crux of the Eleventh Circuit's rulings in the *Admiral's Cove* and *White* decisions, as confirmed by the *Cable Holdings II* Court. *Cable Holdings II*, 953 F.2d at 608-609.

E. *Cable Holdings II* Is Consistent With The Public Policy Underlying The Cable Act.

Property owners are entitled, short of blocking access to dedicated easements, to contract on an exclusive basis for the provision of cable programming services from the supplier of their choice. Had Congress wanted to mandate head-to-head competition between cable providers on private property, Congress would not have exempted property owners who had already provided cable services to residents from the reach of § 633. In essence, Cable Holdings is claiming Section 621(a)(2) made illegal what Section 633 made legal despite the co-existence of the two sections in the Cable Act.

Consistent with the Eleventh Circuit, the Third Circuit does not consider the property owner's exclusion of the franchised operator in favor of an alternative cable services provider to be contrary to federal law or policy:

> We note in passing that even those members of Congress who supported the draft of § 633 which would have provided mandatory access were *motivated by a concern that tenants of multi-unit*

> *dwellings might not have access to cable in the absence of such a provision.* In this case, however, there is *no* basis for any such concern because [the property owner's] tenants *do* have access to cable television, *albeit service provided by a different system.*

Cable Investments, 867 F.2d at 156 n. 3 (emphasis added).

Cable Holdings' construction of § 621(a)(2) is hardly mandated by the stated purposes of the Cable Act to promote competition, establish uniform standards, encourage the growth and development of cable systems and assure the widest diversity of information to the public.[21] In fact, Cable Holdings' construction completely nullifies these objectives. Under a pro-competitive scheme, why would only cable franchisees be entitled to force access to every multi-unit dwelling and single family home in the nation, while competing alternative video services providers would have to negotiate and pay for such rights of access?

According to Cable Holdings, since the Cable Act grants such forced access rights solely to cable franchisees, only they can challenge an exclusive cable agreement. If a franchised operator negotiates an exclusive contract with a landlord, competing alternative video services providers have no remedy; the Cable Act *protects* exclusive cable contracts negotiated by cable franchisees, but *outlaws* the identical contracts if negotiated by competitors.[22] Cable

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[21] Cable Holdings posits that Congress did not intend that the "bizarre array of arcane" state law governing dedication would govern the cable franchisee's right of access. Petition at 19-20. Yet a review of any digest or hornbook reveals the virtual uniformity with which the states have defined "dedicated" as an unequivocal offer by the owner to devote his property to a public use, and acceptance of that offer by the public. *See, e.g.*, 23 Am. Jur. 2d *Dedication* § 1 (1983); 26 C.J.S. *Dedication* § 1 (1956); Tiffany, *The Law of Real Property* § 1098 (3d ed.).

[22] In fact, Cable Holdings' own contracts to serve the apartment complexes at issue here granted *exclusivity*. Cable Holdings maintains its agreements were perfectly lawful under the Cable Act when it had the advantage of exclusivity, but suddenly that same exclusivity became unlawful when obtained by its competitor.

Holdings fails to explain how Congress' intent to promote competition is furthered by tilting the playing field in favor of cable franchisees to the detriment of their competitors. Cable Holdings' goal is obvious: to thwart competition in defiance of the language and the spirit of the Cable Act.

F. *Cable Holdings II* Is Consistent With The Federal Communications Commission Construction Of § 621(a)(2).

The FCC has determined that the statutory scheme of § 621(a)(2) looks to state property law to interpret and enforce the nature and extent of cable franchisees' access rights to "easements dedicated for compatible uses." *See Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18647 n. 51 (1985). In fact, the FCC recognized that the term "dedicated" had a special meaning and underscored Congress' intentional use of the term.[23] Rather than explicate the meaning of the term "dedicated," the FCC simply stated that the language is self-explanatory. *Id.* Thus, the FCC, in merely reiterating the precise language of the Act, gave no real guidance at that time as to congressional intent. *See Cable Investments*, 867 F.2d at 155 n. 2.

More recently, the FCC, in describing local jurisdictional impediments to the growth of competitors to monopoly cable franchisees, expressed its opposition to state cable mandatory access laws and apparently to the expansive construction of § 621(a)(2) urged by Cable Holdings:

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[23] As Cable Holdings concedes, Petition at 21 and n. 18, the FCC, upon final adoption of its implementing rules, corrected an earlier misquotation of the language of Section 621(a)(2) and agreed "with the commenters on the use of the term 'dedicated' " and stated that its use "of the phrase 'designated for compatible uses' . . . was not intended to be any more or less encompassing than the phrase 'dedicated for compatible uses' used in the Cable Act." *Amendment to Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18647 n. 51 (1985).

> '[M]andatory access' laws exist in thirteen states and the District of Columbia. These laws provide franchised cable operators, but generally not other multichannel video providers, with mandatory access to buildings. Even in some jurisdictions without mandatory access laws, local authorities achieve the same result by interpreting § 621 of the 1984 Cable Act (47 U.S.C. § 541), which provides franchised cable operators with access to '*dedicated easements*', to apply to *private easements*. In this way, franchised cable operators are granted access to all buildings in which an internal cable system has been provided to tenants or cooperative owners.
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> * * *
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> After reviewing the record, we believe that discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services. Legislative action is needed to cure this problem.

In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC MM Docket No. 89-600, ¶¶102 and 140 (released July 31, 1990). *See also id.*, ¶ 137.

On the basis of the few signals afforded by the FCC on the precise issues raised by the Petition, *Cable Holdings II* cannot be read as conflicting with any FCC construction of the statute.

II. THE FORCED INSTALLATION OF CABLE FACILITIES WITHIN A PRIVATE EASEMENT IS A *PER SE* TAKING OF PRIVATE PROPERTY NECESSITATING THE PAYMENT OF JUST COMPENSATION.

Section 621(a)(2) would be rendered unconstitutional if construed to create a mandatory right of access to private easements against the will of the easement holder and/or the landowner, unless the section also requires just compensation for the taking. Private easements clearly con-

stitute private property. The forced installation of cable facilities within a private easement is a taking of private property requiring the payment of just compensation under the Fifth Amendment to the United States Constitution. *See Loretto*, 458 U.S. at 421. Except for the federal district court below, every court which has found a right of access to private easements has recognized the taking which such forced access permits, and has implied a just compensation provision into § 621(a)(2) in order to preserve its constitutionality. *See Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*, 682 F. Supp. 1244 (D. Mass. 1985); *United Cable*, No. L89-30103 CA, slip op. at 7; *Mumaugh*, 456 N.W.2d at 430. Cable Holdings stands alone in claiming that forced access to a private easement does not constitute a taking of private property.

The apportionment or "co-use" cases cited by Cable Holdings, Petition at 25, did *not* involve *forced* access by a cable franchisee to a private easement over the objection of the private easement holder. Rather, such cases involved the *voluntary* apportionment of a private easement by a utility whose own easement contract with the landowner granted the utility the right to so apportion; the landowner, having granted the utility the right to apportion, could not raise objection. None of these cases held that the utility could be *forced* to apportion its easement for the benefit of the cable franchisee.

Cable Holdings confuses the issue of taking a private easement *by force* with the issue of a consensual use of a private easement via a *voluntary* apportionment by a utility empowered by contract to apportion.[24] Cable Holdings' actual claim is that § 621(a)(2) *automatically* grants

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[24] If Section 621(a)(2) merely permits the "co-use" of existing easements consistent with already existing common law rights, *i.e.*, use through an apportionment of an easement, Cable Holdings still possesses no access right here. Cable Holdings submitted no evidence that any easement holder (1) has an apportionable easement and (2) has voluntarily agreed that Cable Holdings may access and "co-use" a portion of that easement.

broader, *forced* access to *all* private utility easements, whether or not apportionable, whether or not consent is granted. Yet, if not apportionable, the forced installation of facilities within the private easement violates the landowner's constitutional right to repel a permanent physical occupation; a property interest has been taken without consent and without just compensation.[25] If the private easement is apportionable, § 621(a)(2) is unconstitutional if it forces the easement holder, be it a utility or as alleged here, the competing private cable operator, to apportion its valuable property interest without just compensation. *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Section 621(a)(2) simply did not grant cable franchisees such eminent domain powers.

In *Florida Power*, this Court upheld the constitutionality of the Pole Attachments Act precisely because utilities have the right to refuse access to cable franchisees: "[N]othing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." *Florida Power*, 480 U.S. at 251. Since the statute did not authorize a taking, the absence of a just compensation provision was not fatal. Equally important, the utility therein had voluntarily entered into a contractual relationship with the cable franchisee, not with a third party on whose private rights the cable franchisee sought to piggyback by force. By contrast, Cable Holdings argues that the Cable Act prohibits both the property owner and the easement holder from repelling its permanent physical invasion.

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[25] *See Media General*, 737 F. Supp. at 909 (emphasis added):

> Distilled to its essence, [the franchised operator's] position is that if a landowner encumbers his property by permitting any other party, not just a utility, to use it in a manner compatible with construction of a cable franchisee's system, the Act authorizes access by cable franchisees. After *Loretto, such degradation of private property rights, including private* easements, is impermissible.

What is clear is that someone holds the interest in the property, both exterior and interior, on which Cable Holdings intends to affix its cable facilities by force. Whether that someone holding the right to exclude is the landowner, the competing private cable operator, or a utility, it is certain that Cable Holdings' permanent physical occupation of that property is a *per se* taking under this Court's *Loretto* decision.[26]

Cable Holdings attempts to avoid the constitutional implications of its intended physical invasion of the apartment complexes at issue here by incorrectly characterizing § 621(a)(2) as "a land use regulation which also does not constitute a taking because it does not deprive the property owner of all economically beneficial uses of the property." Petition at 24. It is wholly clear, and all courts, save the district court below, have consistently ruled that the forced installation of cable facilities within a private easement constitutes a permanent, physical invasion.[27] The nature of the access right sought by Cable Holdings here entails a permanent, physical occupation of property by a "third-party interloper", rather than a governmental restriction on permissible uses of the property. Accordingly, all of the regulatory takings cases analyzed by Cable Holdings, Petition at 23-26, are irrelevant.

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[26] In granting an easement, whether to a utility or not, the grantor gives the grantee, and no others, specific rights to use the underlying property. The Act, if it authorizes access via utility easements, essentially condemns space within these easements for use by the franchisee. This is an additional use of the easement not contemplated by the grantor or the grantee. *Loretto* teaches that such compelled access, if for a permanent physical occupation, is a taking *per se*.

Media General, 737 F. Supp. at 908.

[27] The *Admiral's Cove* and *White* decisions are not contrary to this conclusion. As discussed *supra* at § I.A., those panels found that the physical invasion of a dedicated easement does not constitute a taking because the property owner has granted permission for the invasion. This is not the same as a physical invasion of a private easement where neither the property owner nor the easement holder has granted permission for the invasion.

The *Cable Holdings II* Court properly examined Cable Holdings' access claims under a *per se* takings analysis. Far from "hiding from the takings question", Petition at 22, the Eleventh Circuit has confronted it head-on, and has determined that Congress definitively refused to authorize such forced access.

III. SECTION 621(a)(2) DOES NOT PROVIDE FOR JUST COMPENSATION BECAUSE NO TAKING IS AUTHORIZED

A careful comparison of the statutory language of prior § 633 and § 621(a)(2), as well as the differences in the attendant legislative history, defeat Cable Holdings' attempt to graft a just compensation provision onto § 621(a)(2). During the co-existence of the two sections, § 621(a)(2) already contained, by cross-reference to § 633, subsections (A), (B), and (C) as those subsections currently read. Section 633 contained not only those subsections, but also subsections (b)(1)(D), (c), and (d). Each of these latter subsections set forth the just compensation mechanism and limited landowner payments to whatever just compensation amount was ultimately determined.[28] Thus, while cable franchisees had to protect the safety of property and persons ((A)), bear the cost of such installation ((B)) and compensate owners for any *damages* caused ((C)), § 621(a)(2) did *not* require compensation for the *value* of

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[28] That mechanism would have required scrutiny of the "extent to which the cable system facilities physically occupy the premises; the actual long-term damage which the cable system facilities may cause to the premises; the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and the enhancement in value of the premises resulting from the availability of cable service." H.R. Rep. 98-934, 98th Cong. 2d Sess. 81, 115 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4718. "As initially drafted, therefore, the Act not only unambiguously required that a franchisee be given access, but also explicitly provided just compensation for the concomitant taking." *Media General*, 737 F. Supp. at 910.

any property taken, *i.e.*, subsection (D) of § 633(b)(1).[29] Had Congress intended § 621(a)(2) to involve a taking, as did § 633, Congress would have cross-referenced subsections (b)(1)(D), (c) and (d) as well as (B)(1)(A)(B) and (C) at the time of co-existence. No rational basis exists for Congress to distinguish between how just compensation was guaranteed in one section as opposed to the other if both were deemed to trigger a taking. When § 633 was finally deleted, none of the three subsections governing the payment of just compensation was kept for inclusion in § 621(a)(2).[30] Section 621(a)(2) remained just as it was when it co-existed with § 633.[31]

The legislative history explaining § 633 proves that Congress did not intend that § 621(a)(2) would trigger a taking necessitating just compensation. Therein, the *Loretto* decision was discussed, and Congress expressly referenced (b)(1)(D) and (d) as the provisions designed "to comply with the constitutional requirements set forth by the [*Loretto*]

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[29] *See Cable Investments*, 867 F.2d at 158 ("Congress recognized the distinction between damages for which the cable company must compensate under subsection 621(a)(2)(C) and long-term damages which are to be considered in determining just compensation for a taking, which were the subject of the deleted subsection 633(d)(2)").

[30] Congress' failure to transfer to section 621 the subsections requiring regulations that guaranteed just compensation for takings and enumerating the factors to consider in calculating just compensation suggests that Congress recognized that once it deleted the provision for mandatory access to multiple unit dwellings, it need no longer be concerned with the "taking" issue.

Cable Investments, 867 F.2d at 158.

[31] While Cable Holdings surmises that the absence of these just compensation provisions in Section 621(a)(2) is due to Congress' alleged realization that "just compensation methods" could not be "legislated," Petition at 27-28, there is no legislative history support for such speculation nor is there any indication that had Congress *kept* Section 633 in the Cable Act, that Congress would have deleted these "just compensation methods" from Section 633 itself. Cable Holdings' reliance on *Florida Power* is misplaced since that ruling was *post-passage* of the Cable Act and Congress cannot be charged with any knowledge of its teachings.

court." H.R. Rep. 98-934, 98th Cong., 2d Sess. 115 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4718. By contrast, the one paragraph legislative history of § 621(a)(2) *never* contained any discussion of the *Loretto* decision and its just compensation dictate. Surely, upon the deletion of § 633, Congress would have included the "*Loretto* legislative history" in the § 621(a)(2) legislative history had Congress contemplated that § 621(a)(2) would work a taking.

The *Cable Holdings II* Court properly determined that the lack of just compensation in § 621(a)(2) was not a congressional oversight dooming the section's validity, but rather was a critical indication that no taking was contemplated in the first instance. It is Cable Holdings' construction which would prove fatal to § 621(a)(2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. The decision below comports with the statutory language of § 621(a)(2) and its legislative history, is consistent with all other federal circuit constructions of the statutory provision, and is in complete accord with this Court's *Loretto* and *Florida Power* decisions.

Respectfully submitted,

DEBORAH C. COSTLOW
Counsel of Record
THOMAS C. POWER
WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700

Counsel for Respondents

Dated: August 5, 1992
Washington, D.C.